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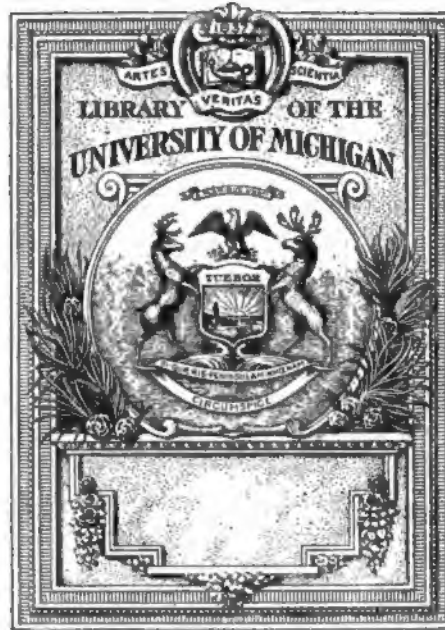
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SUPPLEMENT — IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER

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CONFLICTS OF INTERNATIONAL LAW WITH NATIONAL LAWS AND ORDINANCES

THE decision of the judicial committee of the Privy Council of Great Britain in the case of the *Zamora*¹ will undoubtedly go down in history as one of the great triumphs of international law. In the midst of a war involving questions of national existence and, even more important, of the ideals which shall survive and determine the direction of the world's future political and social development, the law of nations has proved itself superior, in the courts of one of the belligerents, to a rule of military expediency promulgated in legal form by that belligerent government. In this case at least a British court has informed its government in unmistakable terms that Orders in Council governing the conduct of war must be in accord with international law or they will not be regarded as law for the prize courts.

This case again brings into prominence the perennial question of the relation of international to municipal law. Does it prove finally that international law is part of municipal law?² It certainly shows that international law is regarded by the judicial committee as a body of rules and principles subject to judicial cognizance. But what reader of *Triquet v. Bath*, the *Maria*, the *Charming Betsey*, the *Paquete Habana* and *West Rand Central Gold Mining Co. v. Rex*³ can doubt that this has been an established rule of Anglo-

¹ The *Zamora*, L. R. 1916, 2 A. C. 77; this JOURNAL, 10; 427.

² J. B. Scott and W. W. Willoughby, "The Legal Nature of Treaties," this JOURNAL, 1: 831, 2: 357; John Westlake, "Is International Law a part of the Law of England," Law Quar. Rev. 22: 14; C. M. Picciotto, The Relation of International Law to the Law of England and of the United States of America, N. Y., 1915; Quincy Wright, "The Enforcement of International Law through Municipal Law in the United States," Univ. of Ill. Studies in the Social Sciences, Vol. 5, No. 1, 1916, pp. 11, 219.

³ *Triquet v. Bath*, 3 Burr. 1478 (1764); the *Maria*, 1 Rob. 340 (1799); the *Charming Betsey*, 2 Cranch 64 (1804); the *Paquete Habana*, 175 U. S. 677 (1899); *West Rand Central Gold Mining Co. v. Rex*, L. R. 1905, 2 K. B. 391, 407.

American jurisprudence for over a century? But the decision goes farther than this. It shows that international law is not only regarded as a source of law in British courts, but that, as compared with the law embodied in Orders in Council, it is a source of superior authority. Suppose, however, the text of the Order in Council had been embodied in an Act of Parliament. What then? The court in this case left no room for doubt that it would have applied the statute.

The question whether international law is a part of municipal law, remains as it was before, a question of point of view and definition. The Austinian can still point out that in the *Zamora* the court was bound by the Prize Act of 1864,⁴ which specifically required it to apply international law, and hence the rule applied owed its authority, not to international law, but to an Act of Parliament inherently superior to an Order in Council. Hence he can conclude that the court did not apply international law *per se*, but only the rule of international law as commanded by the national sovereign.

On the other hand, the historical jurist can state that the authority of international law in British prize courts is of extremely complex origin, both historical and practical, and at any rate is beside the point at issue. The fact cannot be disputed that in this case international law was applied and not the Order in Council.

Define international and municipal law from the standpoint of the authorities which can repeal or amend their respective rules, and hence in a certain sense have commanded them, and they have nothing in common. Define them from the standpoint of the actual sources used in administering the two branches of law and they overlap. The first is the standpoint of the legislator, the second of the court. The legislator recognizes as law only that which he has made or at least can repeal. The judge recognizes everything as law which he can apply. The judge when applying principles deduced from a study of international practice does not doubt but that he is applying international law, but the legislator says "these principles cannot be international law, for I can compel the judge to apply others in their stead, and yet I have no authority to repeal or alter true international law."

⁴ 27-28 Vict. Ch. 25, sec. 55, par. 5.

The present study will adopt the point of view of the court, to which end the question should be stated: Is international law (as evidenced in its appropriate sources) a source of law to which national courts are obliged to turn in appropriate cases? There can be no question but that in a controversy involving international elements, courts of all states will apply international law in the absence of other more authoritative sources, although the frequency with which such circumstances occur may vary according to the completeness with which all possible human relationships are covered by national codes, ordinances, and precedents. Judges are not ones to employ the unaided reason when authority can be studied.

The more important question, however, is that of the attitude of national courts to international law in case it conflicts with a rule embodied in some other source of law. This question must be answered for each country with reference to its own jurisprudence.

SOURCES OF LAW

The important sources of national law arranged in the order of their juridical binding force are: (1) statutes, (2) judicial precedents, (3) opinions of experts, (4) customs, (5) ideas of justice, reason, or expediency.⁵ The last three of these sources are in themselves indefinite, and courts will generally apply international law, in appropriate cases, where resort must be made to such sources. In all states international law is deemed to be incorporated in such sources of law. The opinions of experts include the opinions of text-writers on international law. International law, itself founded on custom, is the law applied when custom is resorted to in determining a case involving international elements. So also, rather than appeal to unaided reason, judges will seldom refuse to lean on the authority of a rule of international law, if such exists, applicable to the case in hand. In Civil Law countries judicial precedents have little

⁵ J. C. Gray, *Nature and Sources of the Law*, N. Y. 1909, p. 110; J. P. Hall, "The Force of Precedents in International Law," *Int. Jour. of Ethics*, 26: 149; W. Loewy, translation, *The Civil Code of the German Empire*, Boston, 1909, Introduction, pp. xlvii-liii.

more weight than expert opinions and will seldom in themselves stand in the way of a judicial application of international law.

It is only when a conflict occurs between international law and a rule laid down by an official law-making authority, which includes in the United States constitutional assemblies, in all countries legislatures and executive officers issuing ordinances within their competence, and in Common Law countries courts of justice laying down judicial precedents, it is only in the case of such a conflict, that a question arises as to the relative superiority of international law and municipal law in judicial tribunals.

International law may, then, come in conflict with (1) written constitutions having the force of law, (2) with statutes in the narrower sense, (3) with executive orders issued under proper constitutional or legislative authority, all of which are considered statutes in the wider sense; or (4) with judicial precedents having the binding force of law.

Such conflicts may be resolved in two ways. Westlake⁶ has pointed out that, in the Roman world, the practice in the case of a conflict of laws was to extract the residuum of each and thus construct a *jus gentium* consisting of the essence of the law of all nations. In the Middle Ages, because of the extreme diversity in Roman and barbarian legal ideas and the lack of a common jurisdiction, the very different process of selecting one law to the exclusion of the other was adopted, — a system which has continued in the modern rules of conflict of laws.

Thus in the case of a conflict of laws, one may be applied at the expense of the other, or an attempt may be made to reconcile the two rules by applying the essence if not the form of each. Either *selection* or *interpretation* may be resorted to, the first emphasizing the diversity of bodies of law, the second the unity of law.

⁶ John Westlake, *Collected Papers*, Cambridge, 1915, p. 291. This theory of the origin of *jus gentium* was maintained by Savigny, Austin and Maine, but later investigators, such as Muirhead, Sohm, and Willoughby, are inclined to doubt it, considering *jus gentium* a special branch of the Civil Law applied to aliens. This view, however, does not deny that a comparison and reconciliation of the diverse laws of aliens aided in the development of *jus gentium*.

INTERNATIONAL LAW AND CONSTITUTIONS

Conflicts between customary international law and constitutional provisions can only arise for judicial settlement in the United States, where the Constitution is law, applicable in courts. There can be little question but that in such a case the Constitution, as the supreme law of the land, binds the court. It has, however, been generally interpreted in harmony with international law. Thus the constitutional guarantee that a person accused of crime shall have compulsory process for obtaining witnesses,⁷ would probably be interpreted as meaning that the accused shall have the same rights of compelling testimony as the prosecution, and consequently would not apply to diplomatic officers exempt from such process by international law.⁸

It should also be suggested that reserved States' rights, sometimes implied from the Constitution, probably offer no obstacle to the application of international law by courts. So far as any constitutional rights of the States are concerned, Federal courts might exercise the police power within the States and apply international law to protect rights of aliens guaranteed by that law. In *United States v. Arjona*,⁹ a statute providing criminal punishment for counterfeiting the securities of foreign states was upheld as within the competence of Congress under its authority "to define and punish . . . offenses against the law of nations."

Under the same constitutional provision Congress passed an Act in 1842¹⁰ giving Federal courts jurisdiction to release from State

⁷ Constitution, Amendment VI.

⁸ This was the view of the court in *Dillon's Case*, Fed. Cas. 3914 (1854) in which a treaty immunity of a consul was in conflict with the constitutional guarantee; and this immunity of diplomatic officers from giving testimony, but in both cases for the prosecution, was recognized in the case of *Dubois*, the Dutch Minister (Sen. Ex. Doc. No. 21, 34th Cong., 3rd Sess. 1856, Moore, *Dig. Int. Law*, 4: 662, Oppenheim, *op. cit.*, 1: 466) and in the case of *Camacho*, the Venezuelan Minister, (*Guiteau's trial* (1881), Wharton, 1: 669, Scott, 196). In the latter case the minister, under instructions from his government, voluntarily appeared as a witness. An Act of April 30, 1790, Rev. Stat. sec. 4063, specifically forbids the issue of process against a public minister.

⁹ 120 U. S. 479.

¹⁰ Act of Aug. 29, 1842, Rev. Stat. sec. 753.

courts on *habeas corpus* aliens in custody for acts done under an alleged right of international law. The Act resulted from the inability of the National Government to liberate one Alexander McLeod from the custody of a New York court, where he was held on a charge of murder, perpetrated as a British soldier during the *Caroline* disturbance. As is well known, Great Britain had protested against McLeod's detention on the ground that as a military person acting under authority he was exempt from American jurisdiction.¹¹

These Acts, as well as numerous others¹² passed by Congress under the constitutional provision mentioned and uniformly sustained by the courts, indicate that the division of powers between the State and National Governments provided for in the Constitution furnish no obstacle to the passage by Congress of any measure in pursuance of obligations of international law, no matter how much it might appear to invade the so-called States' rights. Hence a conflict between international law and the Constitution in that respect would not be possible. Difficulties have arisen, as in the McLeod case, and the various Italian and Chinese lynchings, from the failure of Congress to act, not from an inherent conflict between the Constitution and the ability of the National Government to fulfill its obligations under international law.¹³

¹¹ Moore, Dig., 2: 24-30.

¹² The most important Acts of this character are the Neutrality Acts, and various Acts for the protection of resident diplomatic officers.

¹³ W. W. Willoughby, *The American Constitutional System*, New York, 1904, p. 108; J. N. Pomeroy, *An Introduction to the Constitutional Law of the United States*, 9th ed., New York, 1886, p. 571; E. S. Corwin, *National Supremacy*, New York, 1913, pp. 288-289; Nelson Gammons, "The Responsibility of the Federal Government for Violations of the Rights of Aliens," this JOURNAL, 8: 73. Messages President Harrison, 1891, and President McKinley, 1899, 1900, Moore, 6: 839, 847, 848. Some doubt has been thrown upon this doctrine by the case of *Keller and Ullman v. U. S.*, 213, U. S. 138 (1909), in which an Act of Congress (Feb. 20, 1907, 34 Stat. 898, sec. 3) rendering persons criminally liable for harboring immigrant women as prostitutes within a period of three years of landing, was held unconstitutional. The Government, however, did not attempt to support this legislation under the power of Congress to punish offenses against the law of nations, but under the implied power to regulate immigration. The court indicated that if the law had been in pursuance of a treaty it would have been valid, and a similar provision is now included in the Mann White Slave Act (June 25, 1910, 36 Stat. 825, sec. 6) in pursuance of the International White Slave Convention of 1904,

There is, however, an important constitutional difference between the power of courts to apply customary international law and to apply treaty provisions. Courts can fulfill the latter obligation under their general jurisdiction of cases involving treaties.¹⁴ Whereas they can ordinarily enforce obligations of customary international law only when supplemented by Congressional legislation. This results from the strictly statutory character of the jurisdiction of Federal courts,¹⁵ and renders it important that Congress specifically confer a jurisdiction upon them sufficient for the fulfillment of international obligations.

INTERNATIONAL LAW AND STATUTES

Where the conflict is between a statute and customary international law, the statute prevails. In *Mortenson v. Peters*,¹⁶ a Scotch court condemned a Danish subject for acts committed beyond the three-mile limit in accord with a statutory regulation of fisheries, thus extending its jurisdiction beyond that permitted by international law. Lord Dunedin said during the course of his opinion:

Malloy, *Treaties, Conventions, etc.*, p. 2131. It is submitted that if the protection of aliens in certain matters could be shown to be required by customary international law, an Act of Congress offering such protection by the criminal punishment of offenders would be constitutional.

¹⁴ Constitution, Art. III, sec. 2; Act, Aug. 13, 1888, 25 Stat. 433; Federal Judicial Code, 1911, 36 Stat. 1087, sec. 24, cl. 1, 17, secs. 28, 237. For the fulfillment of some treaty obligations, especially those requiring the exercise of a criminal jurisdiction, supplementary legislation is necessary.

¹⁵ *U. S. v. Hudson*, 7 Cranch 32; *Ex parte McCardle*, 7 Wall. 506. A common law jurisdiction over crimes against international law was supported in Federal courts in the early cases of *In re Henfield*, Fed. Cas. 6360, and *U. S. v. Ravara*, 2 Dall. 297, but the later decisions have not supported this view.

¹⁶ *Mortensen v. Peters*, 14 Scot. L. T. R. 227 (1906); 8 Fraser 93; Bentwich, *Cases*, 12. In *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), A. C. 394, the Privy Council held that an Act of Parliament made it conclusive that Conception Bay, Newfoundland, was British territorial water, although the headlands were thirty miles apart. It should be noted, however, that the court also put forward prescription as a justification of this extension of jurisdiction under international law. See also dicta by Lord Cockburn in *Regina v. Keyn* (1876), 2 Ex. D. 63; Stephen, *History of the Criminal Law*, 2: 36; Picciotto, *op. cit.*, p. 48 *et seq.*

In this court we have nothing to do with the question of whether the legislature has or has not done what foreign Powers may consider an usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For, as an Act of Parliament, duly passed by Lords and Commons and assented to by the King, it is supreme, and we are bound to give effect to its terms.

The same rule applies in prize courts. Thus, in the case of the *Zamora*,¹⁷ the Judicial Committee of the Privy Council, while holding that an Order in Council contrary to international law was not binding, said,

It could not of course be disputed that a prize court, like any other court, was bound by the legislative enactments of its own sovereign state. A British prize court would certainly be bound by Acts of the Imperial Legislature.

In this case no such conflict existed, but, on the contrary, the Prize Act of 1864 especially reserved to the prize court its right to apply international law exclusively.

In American law, also, it is clear that a statute will always be applied even though it conflict with international law. An Act of Congress of March 3, 1863,¹⁸ permitting the requisition of neutral vessels before condemnation, was protested by Great Britain as in violation of international law. Attorney General Bates rendered an official opinion¹⁹ on the question, and while conceding the British contention that the Act if rigorously applied might lead to violations of international law, stated that American officials would nevertheless be bound by it.

Of course such a conflict may lead to diplomatic reclamations, and possibly to war. But that cannot make the Act of Congress cease to be the law of the land, binding upon the people and their judges.

Under Acts prohibiting the killing of fur seals "within the limits of Alaskan territory or in the waters thereof," later extended "to

¹⁷ The *Zamora*, L. R. 1916, 2 A. C. 77, this JOURNAL, 10: 427.

¹⁸ Act of March 3, 1863, 12 Stat. 759. sec. 2.

¹⁹ Bates, Att. Gen., 10 Op. 519.

all the dominions of the United States in Behring Sea" American courts did not hesitate to assume jurisdiction of foreign vessels seized in time of peace sixty miles from the coast in Behring Sea.²⁰ This decision was reached by following the interpretation of these statutes offered by the political department of the Government, which held Behring Sea virtually a *mare clausum*. This interpretation of the statutes was protested by Great Britain as in violation of international law, and her protests being sustained in the arbitration of the question in 1892, the "dominions of the United States in Behring Sea" were held in subsequent cases to extend only to the three-mile limit.²¹

On the other hand, no instance is known where in case of the conflict of a statute with international law the latter has been selected. There have been dicta in both British and American courts to the effect that statutes in conflict with natural law are void,²² and British prize courts have sometimes gone pretty far in asserting their independence of statutes,²³ but no case is known where statutes have been declared void as in conflict with international law.

²⁰ Act of June 27, 1868, Rev. Stat. 1856; Act of March 2, 1889, 25 Stat. 1009. U. S. v. *La Nina*, 49 Fed. Rep. 575; U. S. v. *The James G. Swan*, 20 Fed. Rep. 108; U. S. v. *The Alexander*, 60 Fed. Rep. 914.

²¹ *The Alexander*, 75 Fed. Rep. 519; *La Nina*, 75 Fed. Rep. 513; Moore, 1: 913-922. In his dissent in the case of U. S. v. *Rodgers*, 150 U. S. 249, Justice Brown thought the court was interpreting a statute (Rev. Stat. sec. 5346) in a manner contrary to international law in assuming jurisdiction over an offense committed on board an American vessel on the Canadian side of the Detroit River. The *Cutting Case* (Moore, 2: 243) illustrates the application by a Mexican court of a statute giving jurisdiction over extraterritorial crime, considered by the United States to be in contravention of international law.

²² English Cases: *Day v. Savadge*, Hobart, 85, 87; *Bonham's Case*, 8 Rep. 118a; United States Cases; *Goshen v. Stonington*, 4 Conn. Rep. 209, 225; *Bowman v. Middleton*, 1 Bay. 254 (S. Car. 1792); *Downes v. Bidwell*, 182 U. S. 244, 282.

²³ In the *Flad Oyen*, 1 Rob. 135 (1799), and the *Maria*, 1 Rob. 340 (1799), Lord Stowell strongly asserted that prize courts were "courts of the law of nations" and bound "to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some to be belligerent." In the case of the *Walsingham Packet*, 2 Rob. 77 (1799), the original British and Portuguese owners of the vessel, recaptured from the enemy, sought restoration, which was resisted by the captors under a navigation act (13-14 Car. II, c. 11, s. 22), which declared that the carrying of merchandise by a packet was illegal. There was thus a conflict between a statute and the rule of inter-

In France and Germany no doubt seems ever to have been expressed but that a rule of the codes or a statute in violation of international law is obligatory.

Conflicts between international law and statutes have, however, been resolved by interpretation. In the United States the courts have held that statutes must always be interpreted if possible so as not to conflict with international law. Thus, in the case of the *Charming Betsy*,²⁴ the court held that the Non-intercourse Acts must not be interpreted as permitting extraterritorial seizures in time of peace, and frequently laws couched in universal terms have been interpreted as of only territorial application.²⁵

A British court laid it down, that ²⁶ "If the meaning of the Act is doubtful, it is a reason for not putting a particular interpretation upon it, that that interpretation would violate the comity of nations." In accord with this rule and with the American decision in the *Charming Betsy*, the British prize court, under Lord Stowell, interpreted the Navigation Acts as not applying to foreign vessels seized *jure belli*, although they were clearly applicable to British merchant vessels and couched in general terms.²⁷ Seizure on the high seas, it national law requiring restoration of recaptured prizes. Lord Stowell, after remarking that "this court is properly and directly a court of the law of nations," felt considerable difficulty in taking cognizance of a statute, but after an elaborate argument he did so, citing as a precedent the case of the *Eliza* (Lords, July 13, 1798), in which he said, "it was first decided that the Court of Admiralty was bound to take notice of an illegal practice, evidently appearing in the conduct of a British subject, though the illegality arose from a violation of a law merely municipal."

²⁴ *Murray v. The Charming Betsy*, 2 Cranch 64. See also *Rose v. Himely*, 4 Cranch 241.

²⁵ *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

²⁶ *Leroux v. Brown*, L. J. 22 C. P. 3. In his opinion in *Mortensen v. Peters*, 14 Scot. L. T. R. 227 (1906), Lord Kyllachy said, "A legislature may quite conceivably by oversight or even design exceed what an international tribunal (if such existed) might hold to be its international rights. Still there is always a presumption against its intending to do so. I think that is acknowledged. But then it is only a presumption, and as such it must always give way to the language used if it is clear, and also to all counter-presumptions which may legitimately be had in view." In this case the statute was applied in derogation of international law, as being too clear to permit of any other interpretation.

²⁷ *The Recovery*, 6 Rob. 341 (1807). In *Cope v. Doherty*, 4 K. and J. (1858), which raised an apparent conflict between the international rule of maritime collisions and the British Merchant Shipping Act of 1854, the court held that it could

was held, could only be justified on grounds of international law, and hence confiscations for breach of municipal law could not condemn such a vessel. In the case of the *Elsebe*,²⁸ Lord Stowell held that the grant of the entire product of vessels to the captor by the Prize Act,²⁹ Order in Council and proclamation, must be interpreted as always subject to the power of the Crown to restore the prize to the original owners as an act of policy. Hence, in this case, the right of the alien owners under such a grant was upheld as against the captors' right under the Prize Act. In other cases in both England and the United States similar international rights of both neutral and enemy claimants founded on gratuitous grant of the government³⁰ have been upheld as against statutory claims of captors to prize money.

This rule of interpreting statutes in accord with international law is generally observed in all countries, although the author of the article on diplomatic agents in Fuzier-Hermann's *Repertoire Général du Droit Française*³¹ states that diplomatic residences are not exempt

not interpret the Act as applying to foreigners, because to do so "would be to impute to the legislature of the country an attempt to legislate for foreigners by taking away those rights and privileges which they enjoy by the general law." The *Annapolis*, 30 L. J., P. and M. 201 (1861), involved similar facts and the court, although admitting that if Parliament thought fit to legislate for foreign vessels on the high seas, "the court in its instance jurisdiction at least would be bound to obey," yet said, "the presumption is strong against Parliament by legislation contravening international law. In cases admitting of possible doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction would be accordingly." See also *Le Louis*, 2 Dods. 210; The *Girolame*, 3 Hagg. Adm. 169 (1834). For discussion of these cases see Picciotto, *op. cit.*, p. 27, *et seq.*; T. E. Holland, *Studies in International Law*, Oxford, 1898, p. 195, *et seq.*

²⁸ The *Elsebe*, 5 Rob. 173 (1804).

²⁹ Act 6 Anne C. 37 (1708), granting the entire product of prizes to the captors as prize money.

³⁰ In the *Elsebe*, 5 Rob. 173 (1804), Lord Stowell cited as precedents, the *Freya* (1800), the *St. Johannes* (1798), the *Edwin* (1801), all restored by order of the Crown. For United States cases see The Manila Prize Cases, 188 U. S. 254; Moore, 7: 545. In the *Schooner Peggy*, 1 Cranch 103, Lincoln, Att. Gen. 1 Op. 111, restoration before adjudication was made on the basis of a treaty and was held to violate no vested right of the captors to prize money.

³¹ Fuzier-Hermann, *Repertoire général alphabétique du droit français*, 37 Vols., Paris, 1886-1906, tit. *Agents Diplomatic*, Art. 1067.

from service of legal process in France because no such limitation is put upon the authority of officers to make arrests in Article 98 of the *Code d'Instruction Criminelle*. Other provisions of the French codes have, however, been interpreted as excepting diplomatic officers from their operation in accord with international law, even when no such exemption is specifically given.²²

INTERNATIONAL LAW AND EXECUTIVE ORDERS

In the case of a conflict between customary international law and an executive order, it seems that the latter will usually prevail in the same manner as a statute, although a construction will generally be adopted which resolves the conflict. British prize courts, however, have always asserted their independence of orders in council contravening international law, and the rule is now firmly established. In the early cases the attitude of the court was somewhat cautious. In the case of the *For*,²³ after adverting to the conflict which might occur because of its obligation to apply international law and also to apply Orders in Council, Lord Stowell remarked that the court could not "without extreme indecency" presume that such a conflict would exist. In the case before it, while admitting that the celebrated Order in Council of April 26, 1809, creating a paper blockade of most of Europe, was contrary to customary international law, under ordinary circumstances, denied that it was so in its "retaliatory character." The court did not appear troubled by this application of an undue severity upon neutrals in retaliation for acts of enemies.²⁴

²² Case of Herran, Minister from Honduras, Trib. Seine, Jan. 21, 1875, Clunet, 1875, p. 90, who was held exempt from civil jurisdiction although he was of French nationality and no exemption was specified in the codes. See also Sirey, 1884, 2: 80.

²³ The *For*, Edw. Adm. 312 (1811). Phillimore, Commentaries upon International Law, 3rd ed., London, 1879-1886, Vol. 3, sec. 436, says of this decision, "If he [Lord Stowell] had not so considered them [considered the Orders in Council consistent with international law] and nevertheless had executed them, he would have incurred the same guilt and deserved the same reprehension, as the judge of a municipal court who executed by his sentence an edict of the legislature which plainly violated the law written by the creator upon the conscience of his creature."

²⁴ Such retaliation is somewhat defended by J. P. Hall, The Force of Precedent in International Law, Int. Jour. of Ethics, 26: 149.

A more clear recognition of the superiority of international law over Orders in Council is reported in the case of the *Minerva*,³⁶ in which Sir J. Mackintosh when exercising a commission of prize as recorder of Bombay gave a very restricted interpretation to certain instructions apparently in conflict with international law, and affirmed that in case of a conflict it would be "The duty of a judge to disregard the 'instructions,' and to consult only that universal law to which all civilized princes and states acknowledge themselves to be subject and over which none of them can claim any authority." The British Government at present clearly recognizes the superiority of international law over Orders in Council in prize courts, as is evidenced by the reply made by Earl Grey to a protest of the United States in reference to an Order in Council of March 11, 1915, apparently declaring Germany under a blockade. He says:³⁶

The legality of these measures has not yet formed the subject of a decision of the prize court; but I wish to take this opportunity of reminding your excellency that it is open to any United States citizen whose claim is before the prize court to contend that any Order in Council which may affect his claim is inconsistent with the principles of international law and is, therefore, not binding upon the court.

In this communication his lordship referred to the recent decision of the prize court in the case of the *Zamora*,³⁷ although the opinion of Sir Samuel Evans in that case does not seem to give unequivocal authority for his statement. In fact, the learned president adopted the ambiguous view of Lord Stowell in the case of the *Fox*,³⁸ which

³⁶ The *Minerva* (1806), Life of Sir J. Mackintosh, London, 1836, 1: 317; Holland, Studies, p. 197; Phillimore, *op. cit.*, Vol. 3, sec. 436; Picciotto, *op. cit.*, p. 32. It seems possible that this decision furnished the main foundation for Lord Stowell's utterances in the *Fox*, five years later. There is a striking similarity in some of the passages. Sir J. Mackintosh admits that he had no "direct and positive authority" for his assertion.

³⁷ Earl Grey to United States Ambassador Page, July 31, 1915, this JOURNAL, Special Supp. 9: 164 (July, 1915). Phillimore, *op. cit.*, Vol. 3, sec. 436, says, "It is clear that it has never been the doctrine of the British prize courts that because they sit under the authority of the Crown, the Crown has authority to prescribe to them rules which violate international law."

³⁸ The *Zamora*, 31 Times L. R. 3, this JOURNAL, 9: 1005.

³⁹ The *Fox*, Edw. Adm. 312.

he quoted with approval, to the effect that an Order in Council in derogation of international law was so improbable as to be beyond the contemplation of the court. A Swedish vessel, the *Zamora*, seized for contraband trade, had been brought in, but prior to adjudication the Crown sought to requisition it under an Order in Council of March 23, 1915.³⁹ The owners of the vessel resisted, claiming that by international law, title to a neutral prize did not pass until after adjudication, and consequently the British Government had no right to requisition the cargo. The Prize Court held that it was bound by Orders in Council, although it further labored to show that this order was not in conflict with international law. In consequence of the latter conclusion, the president did not feel

called upon to declare what the court would or ought to do in an extreme case, if an Order in Council direct something to be done which was clearly repugnant to and subversive of an acknowledged principle of the law of nations. I make bold to express the hope and belief that the nations of the world need not be apprehensive that an Order in Council will emanate from the Government of this country in such violation of the acknowledged law of nations as to make it conceivable that our prize tribunals, holding the law of nations in reverence, would feel called upon to disregard and refuse obedience to the provisions of such orders.

This decision, however, was subsequently reversed by the Judicial Committee of the Privy Council,⁴⁰ the ground being taken that both under the old commissions conferring prize jurisdiction and under the Prize Act of 1864,⁴¹ prize courts were obliged to apply

³⁹ Order XXIX, March 23, 1915, Manual of Emergency Legislation, Supp. No. 3, p. 510; this JOURNAL, Special Supp. 9: 123 (July, 1915).

⁴⁰ The *Zamora*, L. R. 1916, A. C. 77; this JOURNAL, 10: 430. In the earlier case of the *Antares*, 31 Times L. R. 290, similar facts were before the court, but under an earlier Order in Council (Order XXIX, Sept. 30, 1914, Manual of Emergency Legislation, 1914, p. 286). By this order, the judge on receiving a request from the Crown to release an unadjudicated prize for requisition, was to exercise discretion, releasing it only if probably confiscable. The court held the Order in Council to be conformable to international law, but in this case the cargo of copper, which had been declared absolute contraband while the vessel was en route, was possibly not confiscable and hence the request of the Crown was refused.

⁴¹ 27-28 Vict. Ch. 25, sec. 55, par. 5. As evidence of the earlier practice, the court relied especially on the report of the Commissioners on the Silisian Loan Case, 1753. See Moore, Dig., 7: 603.

international law, and hence would not consider an Order in Council in conflict therewith as mandatory. It being held that the requisition of neutral property before condemnation was not permitted by international law, except in extraordinary cases, the application of the Crown was refused. Lord Parker of Waddington, speaking for the court, said:

If the court is to decide judicially in accordance with what it conceives to be the law of nations, it can not even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a prize court and justify the confidence which other nations have hitherto placed in its decisions.

The Meat Packers' Cases⁴² further illustrate the present attitude of the British Prize Court. Neutral vessels, laden with provisions bound from New York to the neutral port of Copenhagen, had been seized for contraband trade, and the owners attempted to show that the Order in Council of October 29, 1914,⁴³ was contrary to international law and void. By an Order in Council of August 20, 1914, Great Britain had adopted the Declaration of London with slight modifications, but by the later order further modifications had superseded that part of the Declaration forbidding confiscation of conditional contraband according to the doctrine of continuous voyage. The meat packers maintained that their cargoes, as conditional contraband bound immediately for a neutral port, were, irrespective of their ultimate destination, entitled to the advantages of the rule of the Declaration of London. The court, however, took a different view and pointed out that the Declaration, not having been ratified, was not binding and in this respect was not declaratory of customary international law, but was an innovation. Hence in abrogating it, and returning to the doctrine of continuous voyage, which the court did not fail to point out was a rule "nurtured and specially

⁴² *The Kim, the Alfred Nobel, the Bjornstjerne Bjornson, the Fridland*, this JOURNAL, 9: 979.

⁴³ *Man. Em. Leg.*, Supp. No. 1, p. 17; this JOURNAL, Special Supp., 9: 14 (July, 1915.)

favored by the United States," the Order in Council simply prevented an innovation and "proceeded not in violation of, but upon the basis of the existing international law upon the subject."

In American courts, executive orders are probably of the same effect as statutes, if made under adequate authority. In *Maissonaire v. Keating*,⁴⁴ Justice Story asserted in dicta that an ordinance would exonerate the captors, and the only recourse open to the injured neutral was through diplomacy or war. There does not seem to have been any doubt expressed as to the binding force of the various blockade orders of the Civil War, or of other executive orders affecting prize in this and other wars.⁴⁵

In Germany the Emperor, by statute,⁴⁶ has the authority to determine by ordinance "the place of sitting and composition of prize courts, the procedure in cases brought before them, and the duties imposed on other administrative authorities, Imperial as well as State, in respect of their coöperation with such courts." Under this law a comprehensive prize code⁴⁷ has been promulgated, which appears to be obligatory law for prize courts.

⁴⁴ *Maissonaire v. Keating*, 2 Gall. 325.

⁴⁵ Naval Instruction of Aug. 18, 1862 (Moore, 7: 700), provided for the seizure of vessels reasonably believed to be "engaged in carrying contraband of war for or to the insurgents, and to their ports directly or indirectly by transshipment or otherwise violating the blockade." This application of the doctrine of continuous voyage to contraband and blockade was considered in violation of international law by many European publicists such as Twiss, Phillimore, Bluntschli, and Fiore (Moore, 7: 723-739), but was applied by United States prize courts. In the *Stephen Hart*, Blatch. 387, Scott, 852, affirmed in the *Hart*, 3 Wall. 559. The instructions are particularly referred to as authority for the decision. See also *The Circassian*, 2 Wall. 135; *The Bermuda*, 3 Wall. 514; *The Springbok*, 5 Wall. 1. In most of these cases it was not clear whether condemnation was for breach of blockade or carriage of contraband, but in the case of the *Peterhoff*, 5 Wall. 28, the distinction was recognized, and it was held that transshipments from neutral ports by land could not be regarded as violations of blockade, and hence such cargoes could only be condemned if contraband. It should be added that the American view of international law was sustained in the arbitral awards subsequently given in most of these cases. Moore, 7: 725; Moore, Int. Arb. 4: 3928-3935.

⁴⁶ Law of May 3, 1884, *Reichsgesetzblatt*, 1884, p. 49. Translation in Huberich and King, *The Prize Code of the German Empire in Force July 1, 1915*, New York, 1915, p. xv.

⁴⁷ Prize Code, Sept. 30, 1909, *Reichsgesetzblatt*, 1914, p. 275, translated in Huberich and King, *op. cit.* Under the Prussian ordinance of July 20, 1864 (*Preuss.*

In the case of the *Elida*⁴⁸ the Supreme Prize Court at Berlin clearly defined the position of ordinances in the German prize courts.

The prize regulations contain the principles laid down by the Kaiser as commander in chief within his Imperial jurisdiction for the practice of prize law pertaining to naval warfare, and are, therefore, primarily law not only for the navy, but also for the inland authorities, particularly prize courts, in so far as they have to pass upon the legality of the action of commanders at sea falling within the prize law. International law only lays down rights and duties as between different states. The prize courts when judging of the legality of prize actions, can take general international principles only into account when the prize regulations contain no instructions and, therefore, tacitly refer to the principles of international law. Therefore, the question whether an instruction of the prize regulations agrees with general international law is not for the prize courts to decide. If a contradiction in this connection is asserted, the point in controversy is to be settled in another manner.

The same rule appears to apply in French courts. The prize law is largely found in ordinances, which are of binding force in courts.⁴⁹ During the Napoleonic Wars, French decrees, such as those of Berlin and Milan, vied with British Orders in Council in violating international law, but they were applied in prize courts.⁵⁰

Ordinarily, in the case of executive orders, the question would not be so much on the conflict of the order with international law

Gesetzblatt, 1864, p. 369; Huberich and King, *op. cit.*, p. xii), prize courts were to apply the existing prize regulations, supplemented if necessary by the general principles of international law and subject to existing treaties. They were also empowered to apply special rules by way of retaliation. See comments on German prize practice in a review of Huberich and King's translation, this JOURNAL, 9: 1028.

⁴⁸ The *Elida*, Oberprisengericht, Berlin, May 8, 1915, this JOURNAL, 10: 916.

⁴⁹ The famous *ordonnance de la marine*, issued by Louis XIV in 1681, forms the basis of French prize law. Comprehensive instructions applicable in prize courts were issued July 28, 1870 (Freeman Snow, *Cases and Opinions on International Law*, Boston, 1893, p. 577), and on December 12, 1912 (Naval War College, *International Law Topics and Discussions*, 13: 169).

⁵⁰ One of the most remarkable of these decrees was that of Bayonne which ordered the seizure of American vessels entering French ports after the passage of the American Embargo Act in 1807, under the theory that such seizures were legal as assisting President Jefferson in enforcing the embargo. *Am. St. Pap., For. Rel.*, 3: 291. For the various French and British retaliatory orders of the Napoleonic Wars, see *ibid.*, 3: 262, 270, 286; *British and For. St. Pap.*, 8: 401-513.

as on the competence of the officer to issue it. If such competence exists, usually the order would be on the same plane as a statute and so would rule when in conflict with international law, but would be interpreted so far as possible in accord with it. Thus, in the case of the *Zamora* the primary ground upon which the British Privy Council declared the Order in Council, contrary to international law, non-mandator, was that by custom and statute the Crown had been divested of its prerogative to legislate for prize courts.

INTERNATIONAL LAW AND JUDICIAL PRECEDENTS

In England and the United States judicial precedents have a legislative value only second to that of statutes. Courts are obliged to follow them according to well-defined rules. It thus happens that precedents will generally be followed, if there are any, irrespective of existing international law. Such precedents may be originally adopted as applications of international law, but once established may prove less flexible than international law, and hence in time come in conflict with it. In such cases, however, the presence of an international rule undoubtedly makes it less difficult to break a precedent than it would otherwise be. Thus the British Prize Court in the war of 1914 broke the precedent established by Lord Stowell over a hundred years before in reference to the confiscability of enemy coast fishing vessels.⁵¹ Although the rule declaring such vessels immune was included in the Hague conventions,⁵² the court noted that this convention was not in terms binding, because all of

⁵¹ In the *Berlin*, L. R. (1914), P. 265; this JOURNAL, 9: 544; after citing the American decision in the *Paquete Habana*, 175 U. S. 677, and some Japanese decisions and instructions the court said: "In this country I do not think any decided and reported case has treated the immunity of such vessels as a part or rule of the law of nations: *vide* the *Young Jacob and Johanna*, 1 Rob. 20, and the *Liesbet von der Toll*, 5 Rob. 283. But after the lapse of a century I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations." The alteration of judicial precedents by international law is also illustrated in the *Ringende Jacob*, 1 Rob. 89 (1798), in which the court refused to follow the old rule forfeiting neutral vessels for carrying contraband, but applied the more humane rule of releasing the vessel, on the ground that international law had changed. See, also, Westlake, *Collected Papers*, p. 250.

⁵² Hague Conventions, 1907, XI, Art. 3.

the belligerents were not signatories, and based its decision primarily on the change in the rule of customary international law. During the seventeenth century both Admiralty and Common Law courts supported executions against the body on foreign judgments as warranted by international law.⁵³ But international practice did not approve of the rule, and during the next century the British courts overruled the precedent on the ground that international law had changed.⁵⁴

There has also been a tendency in both British and American courts to abandon the old Common Law rule which permitted an alien enemy no *persona standi in judicio*, in accordance with alterations in international law. Lord Stowell stated the old doctrine in the case of the *Hoop*:⁵⁵

In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigor. The same principle is received in our courts of the law of nations; they are so far British courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy. . . . But otherwise he is totally *ex lex*.

The Supreme Court of the United States modified this doctrine in *McVeigh v. United States*,⁵⁶ which involved the Confiscation Act of 1862.⁵⁷ This Act had provided for the appropriation by the United States of property used in rebellion, after a judicial process resembling an admiralty action *in rem*. The Supreme Court permitted the enemy owner to defend and commence action on appeal

⁵³ Malloy, *De Jure Maritimo et Navali*, 7th ed. London, 1722, Bk. 5, chap. 9, sec. 9. Baldwin, "The Part Taken by Courts of Justice in the Development of International Law," *Am. Law Rev.*, 35: 228.

⁵⁴ *Sinclair v. Fraser*, 20 How. St. Tr. 468, cited Baldwin, *op. cit.*, *Am. Law Rev.*, 35: 228.

⁵⁵ *The Hoop*, 1 Rob. 196 (1799); Scott, 521, 523.

⁵⁶ *McVeigh v. U. S.* 11 Wall. 259 (1870).

⁵⁷ Act of July 17, 1862, 12 Stat. 319.

in such proceedings, thereby reversing the court below. Referring to the decision of that court, Justice Swayne remarked:

It is alleged that he was in the position of an enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and our civilization. We cannot hesitate to doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.

This decision was cited with approval in the recent British case of *Merten's Patents*,⁵⁸ in which the Court of Appeals permitted an alien enemy to commence action on appeal. The court distinguished the right of bringing suit and the right of defending when sued. Although it did not sustain the appellee's contention that a provision of the Hague conventions⁵⁹ required a complete abandonment of all restrictions upon the legal status of alien enemies, and consequently affirmed the traditional view that such persons could not commence an original action, yet it admitted that an alien enemy could be sued, in which case he "could appear and be heard in his defense," and take all such steps as may be necessary for the proper presentment of his defense. To deny him these rights, said the court, "would be to deny him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice."⁶⁰

In prize courts a similar tendency to admit alien enemies to a limited status in court has developed as an accompaniment of the exemption from seizure of certain types of enemy property at sea, required under modern international law.⁶¹ The extreme doctrine of the *Hoop* has undoubtedly been much limited in both Common Law and Admiralty courts by the progress of international law. The

⁵⁸ *In re Merten's Patents*, *Porter v. Freudenberg*, *Krelinger v. Samuels*, 112 L. T. 313, 321 (1915).

⁵⁹ Hague Convention, 1907, IV, Art. 23 (h).

⁶⁰ For cases making other exceptions to the disabilities of alien enemies, see L. Oppenheim, *International Law*, 2nd ed., New York, 1912, §: 133.

⁶¹ *The Möve*, L. J. (1915), p. 57, this JOURNAL, 9: 547.

disabilities of alien enemies have been entirely removed in Germany,⁶² and remain to but a limited extent in France.⁶³

In conclusion, it may be said that, while customary international law will generally be overruled when coming in conflict with definite written sources of municipal law such as written constitutions, statutes, and executive orders, the presumption will ordinarily exist that no infraction of international law is intended and such instruments will be interpreted in accordance with its principles. International law will furnish a basis for modifying judicial precedents in Great Britain and the United States, and in these countries, especially the former, prize courts assert an authority to ignore executive orders in conflict with international law.

QUINCY WRIGHT.

⁶² The newspapers reported that on Feb. 15, 1916, the Reichsgericht handed down a decision upon an action commenced by a French citizen serving at the front, and appearing through attorney. The decision of the court below, declaring the plaintiff's patent right confiscated, was reversed.

⁶³ Oppenheim, *op. cit.*, 2: 133.

THE IMMUNITY OF PRIVATE PROPERTY FROM CAPTURE AT SEA

THE history of the development of the law of maritime capture is a record of progress. Throughout the series of overlapping changes from the time of indiscriminate capture, changes which brought successively into operation the rules of hostile infection, of the *Consolato del Mare*, of free ships, free goods, and finally of the Declaration of Paris of 1856, the movement has been continuously in the direction of relieving neutral property owners from the strictures imposed upon them by maritime war. "In spite of the interruptions and temporary backward movements in all these various reforms of the law of capture, one cannot fail to trace the red thread which runs through them all: the tendency, advancing in spite of obstacles and efforts at resistance, toward exempting private life from the influence of war."¹

Nevertheless the failure to comprehend or the reluctance to accept the plain conclusions to be drawn from history tend to obscure the elements which at any given time enter into the question of immunity of private property in war at sea. It is easy to regard the establishment of partial limitations upon the right of capture as examples in evidence of a movement toward complete freedom of private property. This is especially encouraged by the existence of the principle of immunity in warfare on land. The advocates of inviolability for the ships and cargoes of maritime entrepreneurs proceed from the argument that war at sea should be assimilated in this respect to war on land to the assertion that the developments which mark the history of the law of capture constitute not only the beginnings of that assimilation but its practical realization in principle.

Whether or not immunity for private enemy property rests upon any fundamental postulate of international law will be considered

¹ R. Kleen, *Lois et Usages de la Neutralité*, Paris, 1898-1900, II, p. 675.

hereafter. It is submitted that whatever may be the status of the principle of immunity in land warfare, in war at sea the rule of capture remains, subject to important limitations in the interest of neutrals and to relatively minor exceptions of certain forms of private enemy property. Neither of these classifications of restriction may be viewed as altering the question of principle. The latter is based upon special considerations of humanity for the advancement of science and art and does not raise the principal question. The former has reached legal standing not through the influence of a theory of protection for private rights *per se*, but through the continuous pressure of forces differently combined at different periods, among which theoretical dialectic is not to be overlooked, for the recognition of the rights of neutrals. At no period has there been a general acceptance among nations of the desirability of exempting enemy ships and enemy goods from the operation of the law of prize.

Immunity and neutral rights are entirely different questions when viewed from the standpoint of theory. The defence of inviolability for all private property at sea so far exceeds in difficulty that of exemption of neutral property as to preclude the drawing of any conclusions regarding the former from the establishment of the latter. But greater than the influence of theory has been the power of neutral governments to enforce observance of rights which they have at different periods considered to be lawfully theirs. The latest step taken by belligerents in acknowledgment of such rights is one which permits the transportation in neutral vessels, without fear of confiscation, of non-contraband cargoes owned by belligerents. The Dutch origin of this, the free ships, free goods principle; the record of its maintenance by the Armed Neutralities; and finally the voluntary incorporation of the principle by Great Britain in her rules for the conduct of maritime operations in the Crimean War; render it impossible to regard this final advance as anything but a concession to neutrals.

The establishment of complete inviolability as a principle of maritime warfare remains, therefore, an ideal. The two avenues of approach to an adequate understanding of the present tendencies

toward or away from a realization of the ideal in practice are: (1) the appreciation of practice under the legal limitations upon capture that now exist and (2) the estimation of the present status of the movement for immunity.

Dealing first with the observance of the existing law of capture, attention is necessarily centered upon the second and the third rules of the Declaration of Paris. The latter of the two rules, which provides for freedom from confiscation for neutral goods on enemy vessels, may be the more briefly considered.

In placing his goods on board an enemy ship a neutral must anticipate the possibility of the capture of the ship and consequent loss of time and profit. Lengthened contraband lists, a feature of modern practice which will be considered immediately, affect such ventures as well as those upon neutral ships. The most serious though not peculiar liability which neutral cargoes undergo upon enemy vessels is one which follows upon the continuance of the ancient practice of destruction. While Great Britain maintains the rule of compensation for neutral property destroyed with enemy merchant vessels, the usual determination of prize courts has been in the contrary sense. Such decisions are based upon the law of military necessity and pay no heed to the logical alternative of compensation when neutral property, granted immunity from capture by the Declaration of Paris, has been destroyed. Although the right to destroy must be admitted, it appears reasonable to demand that the fact of the presence of neutral property on board be taken into account in the judicial determination of the degree of military necessity. Bentwich, however, goes further than is justified by the facts regarding the destruction of enemy ships conveying neutral goods, when he foresees the general destruction of enemy vessels should they be rendered legally free from capture.² It is more probable that, if the ships themselves were not regarded as contraband, the practice would follow that now put in operation against neutral ships, which may be destroyed only upon justifiable suspicion of certain illegalities.

The increased importance of submarine warfare has emphasized

² N. Bentwich, *War and Private Property*, London, 1907, p. 95.

the tendency to act upon *a priori* determinations of military necessity.* Simultaneously, the legal execution of a policy of destruction of captures has been proved to be a doubtful possibility, even if the existence of military necessity be granted. The requirement of visit before destruction of an enemy vessel is one that holds especial difficulties for the submarine, even when the merchant ship is not armed. These difficulties have been increased by the varying practice of submarine commanders in the matter of visit, which has rendered the captains of merchant ships uncertain as to their probable fate and consequently willing to attack a submarine as a measure of defense.

The element of time required for visit and search is more important when the ship visited is neutral and the need arises to ascertain whether or not there is proof on board to justify her destruction. If it is necessary today to conduct a vessel into port for search, the circumstances that render capture impossible—the control of the seas by the enemy—will operate with the same effect to render impossible the legal destruction of neutral vessels. If it is possible to search a ship at sea the time required will increase the danger to the submarine from hostile cruisers.

What the development of the submarine may be cannot be foreseen. Whether it becomes more or becomes less vulnerable, more or less rapid in submerging, larger or smaller, the requirement of visit and search cannot be ignored so long as it remains a rule of international law. To ignore definite legal requirements because such requirements were incorporated into the law without anticipation of a particular means or instrument of warfare, or because they would prevent the most effective use of new equipment for war, would be to divert international law from its present trend toward increased definiteness and increased limitation upon belligerent action harmful to neutrals. The purpose of international law in taking account of new circumstances and new devices to evade old rules, if it is, in part, to maintain the advantages and disadvantages of respec-

* Practice in the present war, as in the Russo-Japanese War, goes far to prove that, for a belligerent whose home and colonial ports are blockaded, and who is faced with the present tendency unfavorable to reception of prizes in neutral ports, the practice of destroying prizes has taken the place of capture.

tive belligerents, is mainly to prevent retrogression from standards attained.

The attitude of belligerents toward the second rule of 1856, by which enemy property in neutral ships is made immune from capture, has been partially dealt with in the preceding paragraph. Since the Russo-Japanese War destruction at sea has become a menace to neutral as well as to enemy ships and their cargoes. But while, as regards neutral ships and cargoes destruction is likely to be practiced only infrequently, other means of evasion of the rule that the neutral flag covers enemy goods not contraband — the actual observance or non-observance of which forms the crux of the question as to the value of the existing regulation of the right of capture — are plentiful. Realizing this, while granting that the letter of the law has been observed strictly, the conclusion that is forced upon the student of recent practice is that, through the unwarranted extension of belligerent rights based upon related portions of the law of maritime warfare, the rule that private enemy property is free when transported in neutral ships very nearly approaches nullity, and is only preserved in some semblance of vigor by the influence of neutral opposition to the devices of belligerents for rendering it a "dead letter." Whether or not the ultimate realization of immunity waits upon the success in practice of the second rule of the Declaration of Paris may be an open question. Arguments have been advanced to the effect that the rule must be abrogated and either complete immunity substituted or the *Consolato* rule revived. It would seem, however, that unless the rule of safety for enemy goods in neutral ships be respected, there is small hope for respect of a similar rule of safety for enemy ships and cargoes.

Belligerent practice since 1856 proves that the device most readily available for evasion of the legal inviolability of enemy cargoes on board neutral merchantmen is the extension of the list of contraband. This device is particularly dangerous, because the arguments upon which it rests are plausible and, to a considerable extent, well founded. It cannot be denied that scientific advance has resulted and is continuously resulting in the application of new articles to the manufacture of equipment and supplies for war. The temptation to emphasize

the possible warlike use of a commodity of commerce has been irresistible. But of more far-reaching effect has become the practical revival of the mediæval doctrine of the relations between the individual citizens and the governments of opposing belligerent countries. This has been brought about by the same development of scientific methods in the field of organization for, and administration of, the totality of the state's resources in time of war, a development which has enabled belligerent governments to destroy the effectiveness of the double classification of contraband. That these phenomena are not mushroom growths of the latest war is readily seen upon reference to the practice of the last thirty years. The present war demonstrates the growing importance of this phase of the problem, since the progress of the struggle has been marked by new additions to the contraband list and new regulations to render the proof of the innocence of a particular cargo more difficult.

Of chief importance in the category of articles transferred from the list of conditional to that of absolute contraband are foodstuffs. The futility of exempting enemy property from capture and, immediately or at convenience, making the chief necessities of life absolute contraband is obvious. The present war has shown in a striking way the inter-relationship of the questions of contraband and of immunity of private property at sea. In view of the attitudes of the Powers toward the former question at the Second Hague Conference, an agreement to abolish contraband by a third Conference may be regarded as among the possibilities.

The transfer, in the Russo-Japanese War, of numerous articles previously rated as conditional contraband to the list of absolute contraband should have been a warning to the delegates at the London Naval Conference that the compromise there formulated, which admitted the application of the doctrine of continuous voyage to absolute but forbade it with regard to conditional contraband, would be ineffective. In the present war, however, the continuous voyage principle has been applied to both categories of contraband, since from its beginning the attitude adopted by the Allies toward national organization for war has been such as virtually to destroy the distinction between them.

Sustained by the authority of British Prize Court decisions, the opinions upon this point handed down by the United States Supreme Court at the time of the Civil War have an excellent prospect of becoming universally accepted in practice, provided, of course, that contraband is retained. The logic of the situation cannot be evaded, and neutral protests have exhibited a realization of that fact.

The right of visit and search has been transformed in practice. There appears to be general agreement that the modern steamship cannot be thoroughly searched at sea. The protests of neutrals directed at detention upon suspicion are therefore likely to be without adequate basis if the suspicion has arisen after visit has been made. While the right of capture persists, belligerents must be expected to make it effective if possible, and neutrals should anticipate an expansion of embarrassing restrictions to correspond with their enlarged facilities for evading capture or detection of guilt. They may demand, however, that the administration of admitted powers be accomplished *bona fide* and with the least possible delay. A probable line of advance lies toward an administrative arrangement by which the character and destination of cargoes may be vouched for officially. The analogy of such a practice with the acceptance of the certification of a public convoying vessel should assure its success as a principle and in practice.

The creation of new presumptions of the destination of conditional contraband to the armed forces of the enemy was foreshadowed in the Declaration of London. Even more onerous than the provisions of that instrument for transferring the burden of proof to the owner of the goods have been the regulations to that end proclaimed during the present war. Articles of conditional contraband have thus found obstacles hitherto unknown to their entrance into enemy territory.

Blockade, applied in accordance with the rules which have received universal acceptance, destroys all unlicensed communication with enemy ports within the scope of its operation, and has always constituted a recognized limitation upon neutral freedom of action. The war zone which was declared by Germany in February, 1915, has been called a submarine blockade, with destruction as the penalty

for attempted breach, but it has lacked the first essential of a blockade, — effectiveness. The absence of that essential element was inevitable in circumstances where capture was impossible and the carrying out of visit and search impracticable. The so-called submarine blockade, like the war zones maintained by the use of mines, depends for effectiveness not upon capacity lawfully to prevent access to and exit from ports in a blockaded area, but upon the incitement of the fear of summary destruction in the owners and captains of merchant vessels. They are both “paper blockades,” a resort to which by belligerents is additional evidence of the importance attached to the ability to control the enemy’s commerce.

The British or Allies’ system, developed with the same motive of control, has likewise reached its climax in the application of blockade. The effectiveness of this blockade, within the principal area of its operation, is unquestioned. It has been lawfully carried out and has even been attended with a degree of moderation of the accepted rules of blockade, since the penalty of confiscation has not been imposed for attempted breach of blockade, and enemy property not contraband captured under a neutral flag has suffered no harder fate than requisition.

But this unwonted moderation of a lawful blockade has been the sop offered to and so far accepted by neutrals for acquiescence in the supplementary “control” which the Allied navies have exercised over the commerce of neutral countries adjacent to or near enemy countries. By a supervision as rigid as that consequent upon the blockade of German ports, trading with the stipulated ports in goods destined for the enemy has been prevented. Where it has been attempted and discovered the same consequences have followed as though the neutral port of destination were blockaded, except for the substitution of requisition for confiscation already noted. Goods which have succeeded in running the gauntlet of presumptions of hostile destination and have thereby proved their final destination to be neutral have been permitted to pass.

This situation brings into opposition the right of a belligerent to blockade an enemy’s ports and the right of a neutral to transport non-contraband goods having an ultimate hostile destination to ports

not blockaded. Since all commerce with the specified neutral ports is not interdicted, the Allies' system is to be regarded simply as a comprehensive and thoroughly executed plan of capture carried out close to the ports of neutral countries situated near hostile territory. It leaves open the way for cargoes destined to be consumed by neutrals, and it affords compensation, payable at the end of the war, to the owners of innocent enemy or neutral property requisitioned from neutral ships.

If this, the crowning feature of the practice of the Allies, is considered apart from its relation to the blockade of German ports, it must be admitted that the second rule of the Declaration of Paris "has followed the Declaration of London into the sphere of ancient history and the neutral flag no longer covers enemy property."⁴ Though that rule must be read subject to the condition that a belligerent may requisition according to his needs, in the present situation there is exhibited the intention of stopping all trade with the enemy. The general recognition of the Declaration of Paris makes the execution of that intention illegal.

If, however, the control exercised over the trade of certain neutral ports be regarded as supplementing the blockade, the same difficulty is experienced in meeting the logic of geography that is met with in discussing the application of the continuous voyage principle to contraband. In both cases the rule of intended destination has been substituted for that of avowed destination, and the substitution, either in view of the changed conditions of transportation or of the inherent logic of the development has a considerable justification in fact and law.

It may be submitted that the points of attack for neutrals who wish to render effectual the rights of their merchants and shippers, are the laws of contraband and blockade. So long as the former permit a belligerent to cut off an indefinite volume of trade with the ports of his enemy and the latter permit the interdiction of all such trade, the rule of continuous voyage must be admitted to be the natural corollary of both. It is absurd and impossible to maintain

⁴ T. Baty, "Naval Warfare: Law and License," this JOURNAL, January, 1916 (Vol. 10), p. 52.

the justice of the principles of contraband and blockade without recognizing that the principle of continuous voyage is also just. The Declaration of Paris has been disregarded, but the continuous voyage doctrine has been only the means used to prevent older belligerent rights from being reduced to absurdities and to maintain the advantages which maritime supremacy has hitherto been held to entail.

Briefly to summarize the preceding conclusions: The letter of the laws of limitation upon capture has been followed, but the laws have not been effective in practice. Contraband, blockade, continuous voyage, presumptions of hostile destination, visit and search, destruction, all of them admittedly established rights, have been extended arbitrarily so that it is impossible to contend that the Declaration of Paris has been observed. The degree of observance that it has been accorded has varied with the differing necessities of opposing belligerents. Continuously the sense of the importance of destroying the enemy's commerce has increased, and alongside this development there has been revived the concept of control over all commerce which may result in assistance to the enemy, a concept which has lacked an adequate field of application since the great wars of the French Revolution and the Empire. In the present war the sanctions of destruction, and of capture with resultant sequestration or requisition, have formed the cardinal elements of the "systems" for control of trade placed in operation by the Central and the Allied Powers respectively. Both of these systems by virtue of their common objective contemplate and, so far as they are effective, accomplish, the overthrow of rules of international law which have been developed after centuries of effort by combining the several means of trade restriction to which a belligerent may have recourse. It is not within the province of this article to discuss the changes which will be necessary in order that the laws which provide for the inviolability of the neutral flag may become effectual. That changes are necessary and that the movement for the immunity of all private property from capture at sea cannot be expected to raise the superstructure of legal limitation until the foundations shall have been strengthened are the inevitable conclusions to be drawn from the last half-century of practice.

Our conclusions upon the tendencies observable in the modern practice of the law of capture may be supplemented by attempting to estimate the present importance of the question of immunity, both as a general issue, debated by the theorists of all countries, and as a political problem, presenting different phases according as the circumstances of states vary.

The partisans of immunity — regarded as a general principle — have most frequently taken as the starting-point of their arguments the proposition that war is to be regarded as giving rise to a legal relationship of states which concerns individuals only indirectly; that the existence of this relationship is already recognized in land warfare, and that logic demands the recognition that what is right and just in one, must be applied in all other fields of warfare if conduct is to conform to the standard demanded by modern civilization. This thesis has always been disputed by the majority of English writers and is losing ground on the Continent in consequence of the increasing tendency to admit that an actual conflict of interests exists between a belligerent state and individual citizens of an opposing state. In the words of Dupuis: "What brings about the submission of the conquered is not the military disaster, it is the consequences of that disaster: the restrictions which the conqueror is in a position to impose upon the activities of the country, thenceforth unable to protect the freedom of its exchanges, of its transactions, of its life."⁵ The Rousseauian theory, upon the basis of which immunity from the evils of war has been demanded and justified for non-participants in military operations, has assuredly never gained public recognition as a legal principle and it appears to be losing rather than gaining the support of theorists.⁶

⁵ *Le Droit de la Guerre Maritime*, Paris, 1911, p. 61.

⁶ Dupuis maintains the theory that capture rests upon a legal principle, as being the sanction of the interdiction of the use of the seas, "seule façon de remplacer sur la mer où la possession et la souveraineté sont impossibles, ce qui est, dans la guerre continentale, l'occupation du territoire." (See *Le Droit de la Guerre Maritime*, p. 64 and note 1.)

Peillon contradicts this sentiment: "On ne parle plus du droit d'interdire la mer à ses ennemis. . . . Car la guerre, aujourd'hui, est un moyen de se faire rendre justice." *La Propriété Privée Ennemie*, Paris, 1910, p. 55.

It is possible, however, to grant the soundness of the theory and still to demonstrate the futility of any attempts to apply it in principle to operations against commerce. Are the great mercantile corporations of the belligerent states, both those which purchase and produce and those which transport, to be looked upon as merely passive participants in a war in which their country is engaged? In importing the necessities of life, to which commerce in time of war reduces itself, are they not as active participants as are those who work the guns? Do they not furnish the means of subsistence? Would not the efforts of actual fighting men be impossible if they could not be fed and clothed? And will not a country's fighting capacity be increased in proportion as it can use its men for actual military operations, leaving to transporters and importers the providing of the necessary supplies? How is it possible to regard the business of maritime commerce as aught else than the indirect but nevertheless active participation in war of the citizens of the belligerent states? Kleen would support his argument to the contrary by pointing out that the real nature of capture is piratical. "The object," he says, "does not become more warlike because it increases — as does everything possessed by the nation — the national capital and consequently the capacity of the state to support the burdens of the war."⁷ But it would be quite illogical and impossible to urge that private goods should not be interfered with simply because they do not come within the traditional and obvious category of contraband. Granted that goods are enemy property being carried in the ships of the enemy; that no neutral nation can be injured by their capture (if such a situation can be imagined under present conditions); the opposing naval forces are concerned only with preventing necessities from reaching their destination. Upon them the individual of the enemy nation has no legal or moral claim, so long as he can be regarded as assisting their opponents.⁸

Nor has that enemy individual any prerogative, as Vidari seems to have supposed, which would permit him to determine the amount of his property and effort, his *activité propre*, that he may expend for

⁷ *Op. cit.*, II, p. 690.

⁸ Bluntschli, *Droit International Codifié*, Paris, 1874, p. 35.

to common good.⁹ War demands the entire effort of a state and proportionately the liabilities of each citizen to maintain the public interest. Conversely, it relieves the enemy state of the necessity of observing the rules of peaceful relationship, since it is impossible to estimate to what extent the other state may demand the assistance of its citizens. Applying the principle of the "police power," which is simply the power of government carried to its ultimate conclusion for the preservation of the life or safety of citizens, the state may authorize the destruction of property without recompense. War creates a greater justification for the exercise of this right than does any imaginable situation of a time of peace. "On principle," Westlake writes, "we must say that the capture at sea of enemy property as such is a military measure, an operation of war, and that its defense is therefore independent of the mediæval doctrine of the solidarity of sovereigns and states with their subjects. . . . Its justification must lie in its effect on the fortunes of a war."¹⁰ Wherefore the attempt to overthrow capture as a right must rest on the comparative ineffectiveness of that means of warfare rather than upon any supposedly legal relationship which should render private individuals immune from direct injury. So that if it be granted that military measures must conform to legal principles and that war is a relation simply between states, the above brief analysis of the relation of the state to the individuals within it appears to demonstrate the futility of attempting to apply the doctrine of Rousseau to the problem of rendering war more humane.

Fortunately that problem does not depend for its solution upon theories of the juridical nature of war. Whether war is *bellum omnium contra omnes* or not, it is by nature cruel and inhumane and for that reason entails naturally an effort to lessen its stringencies, an effort which may be expected to gain strength in proportion as it is recognized to be consistent with the interests of belligerents and of neutrals.

The moral or humanitarian argument for immunity may be pressed

⁹ *Del Rispetto della Proprieta Privata fra gli Stati in Guerra*, 1865, quoted by Charles de Boeck in *De la Propriété Privée Ennemie sous Pavillon Ennemi* Paris, 1882, pp. 452-455. ¹⁰ *International Law*, Cambridge, 1907, II, p. 130.

too far. Capture is only relatively, not absolutely, inhumane. The increased practice of destruction has, indeed, altered the aspect of capture and encouraged attempts of prospective prizes at escape, attempts which usually have ended in disaster to the merchant ships. Where the presumption is that the capture will be lawfully executed, there is small likelihood that the intended prize will try to escape, since the penalties for such an attempt are so severe.

The moral gain derived from the right of capture is to be balanced against the injury which it causes to private undertakings. The interest of neutral as well as hostile merchants and ship owners in urging the prevention or termination of wars has continuously increased as commerce has expanded and as maritime operations have been to a greater extent directed toward the annihilation of all enemy trade. And the prospect of the privations that are certain to result for all classes and, in a great war, in all countries, forms the basis of a restraining influence that should not be overlooked. It appears difficult to argue that capture is a useless weapon, in the face of the vehement protests, heard in the present war, against the stoppage of supplies. It is irrelevant to argue that to support capture on moral grounds is to demand that war be made as frightful as possible, since one may maintain the utility of a practice while refusing to countenance inhumane procedure in its operation.

The factor controlling the attitude of states will continue to be the effectiveness of capture, as a military method supplementing other means of naval warfare. The determination of this question is difficult because of the multitude and variety of its phases. The value of ships and cargoes condemned must be considered, together with the injury caused by imposing an enforced idleness upon great numbers of merchant ships, and by preventing an enemy from bringing his prizes into port, thereby leaving to him the unprofitable alternatives of release or destruction. By causing a dearth of vessels suitable for transports the right of capture may operate to safeguard the captor against invasion. It may prove a means of defense by ridding the seas of ships intended to be used as auxiliary cruisers, by forestalling the transfer of sailors to warships, and by preventing the training of further reserves. The several historical instances of the

failure of a belligerent to attain final victory after destroying the commerce of an adversary frequently have been cited as proof that capture is not a decisive instrument of warfare. That argument fails to take account of the importance of capture to the victor. Capture, like other means of belligerent action, must be judged as one part of a composite scheme, to be retained or discarded according as it is a necessary or unnecessary feature of the combination. The importance of capture cannot be determined in a general formula, since it depends for each particular war upon the degree to which maritime operations are important.

Our study of the supplementary limitations which belligerents have placed upon commerce in time of war is sufficient proof that capture has lost a portion of its effectiveness in consequence of the development of means of communication and the increased rights of neutrals. Without the application of these supplementary measures capture would be useless as a means of shutting off the supplies of continental states, but would retain its usefulness in driving hostile shipping from the seas, thereby increasing the cost of carriage and decreasing the facilities of the enemy for invasion by sea. Directed against an island Power, capture without blockade is apt to be quite as effective as is capture combined with the blockade of a continental Power, since in the former situation there is lacking the possibility of importation across land frontiers.

The military aspect of capture determines its political importance and the several factors of that aspect present different problems to states in different circumstances. These factors will be discussed separately as they affect the interests of different states, in order that the comparative significance of the problems which arise may be readily understood.

It may be prefaced that to neutral states the abolition of capture, *ceteris paribus*, is a matter of indifference. It is unlikely that, as Hautefeuille held in 1868,¹¹ they would be injured thereby, since the need of transports and auxiliaries of other sorts would leave the demand for ships as carriers of commerce as strong or stronger than in times of peace. On the other hand, the obstacles that have been

¹¹ *Quaestiones de Droit Maritime International*, Paris, 1868, pp. 102-104.

observed as rendering of no effect the rights of neutrals in war at sea would still exist. The change would consist simply in the assimilation of private enemy ships and cargoes to the present status of neutral property on the high seas.

The considerations that have moved states in determining their attitudes toward capture are in the main the following:

- (1) Naval strength;
- (2) The extent of foreign trade carried under the national flag;
- (3) The sources of the national food supply;
- (4) The relation of capture to other agencies for control of trade;
- (5) The interests of neutrals.

(1) The arguments by which increases in naval expenditure have been obtained have always effectively included that of the need of a navy sufficient to guarantee the continuance of foreign trade in time of war. Conversely, the confidence inspired by a formidable fleet has at times either rendered states indifferent to immunity or led them to oppose new steps in that direction.

Great Britain today is the one Power in which such a feeling of confidence appears justified. To her the navy is the assurance of her continued existence. Her policy demands the capacity to dominate the seas against any probable combination of Powers. The realization of that result in war will bring as its natural corollary the power to control the enemy's trade, while the securing of supremacy at sea by an adversary would mean the loss of the war. To Great Britain, therefore, the question of immunity appears chiefly a question subsidiary to the question of reduction of armaments. She will consider a decrease of her war equipment provided that other nations, to which other means of warfare such as armies of invasion are more important will consent to moderate their military and naval programs.

The confidence of Great Britain in her naval supremacy must depend to some extent upon her consideration of probable allies and opponents. The history of her alliances of the last sixteen years shows that she now regards an "isolated" position as untenable. This consideration is of much greater importance to the maritime Powers which may contemplate Great Britain as an opponent, so that any discussion of the individual attitudes of states must be

submitted with the recognition that they are likely to be modified by the circumstances of an actual state of war. On the other hand, the alignment of friends and enemies in the present war is not to be regarded as a proper basis for general conclusions as to the advantages and disadvantages of capture for the separate states involved.

(2) If Great Britain is the only Power which may count upon ultimate supremacy at sea in any probable war, other countries may regard capture, used as an offensive weapon for the destruction of British commerce, as of sufficient effectiveness to compel a considerable rise in British freight and insurance rates, and an appreciable transfer of British cargoes to the neutral flag. Germany, France, the United States and Japan each possess the requisite naval strength to interrupt British commerce and cause appreciable loss before the seas could be cleared of their cruisers. The United States, with a small body of shipping to protect, might be able to maintain sufficient strength at sea to be a continuous menace to British commerce.

As navies and mercantile marines now stand, the balance of advantage would remain with Great Britain. In the present war it seems that her commerce has had more to fear from the lack of ships requisitioned for military uses than from losses by capture and destruction. The fate which overtook the few German cruisers found at sea by the British navy has evidently been regarded by the Germans as too high a price to pay for the advantages of the destruction which similar expeditions of theirs might cause to British shipping. Excepting those of the United States, Great Britain is undoubtedly in a position to bottle up the ports of her possible opponents as she has done in the present war, thereby rendering their fleets ineffective through forced inactivity or through destruction, and it is not inconceivable that in the end she could bring the same pressure to bear upon the United States. At the same time she can diffuse the isolated losses likely to result from new methods of attack directed against her widespread foreign trade and prevent the undue rise of insurance rates, as she has done in the present war, by a system of state insurance of ships and cargoes similar to that now in operation in Great Britain.¹² The war appears to demonstrate that so long as

¹² The *Times*, London, August 4, 1914, p. 2.

Great Britain retains her maritime supremacy, she need not fear the transfer of her cargoes to the neutral flag. And since Parliament has made it a criminal offence to treat contracts of insurance upon the ships and cargoes of alien enemies as "debts of honor," British insurance companies will undergo losses due to the exercise of the right of capture upon the property of the enemy by British warships only when they have reinsured neutral companies, which have taken risks on captured property.¹³

On the other hand, the advantages which Great Britain's opponents might have drawn from the legal immunity of enemy goods under neutral flags have not been realized, but have been rendered illusory by methods which have been sufficiently discussed on previous pages. Thus, whereas the right of and limitations upon capture have been of no military value to the Central Powers, to Great Britain the right of capture has been the nucleus about which she has developed her system for the control of enemy trade, while evading the limitations upon that right.

(3) Alone among the great Powers, Great Britain depends for a sufficient food supply upon her ability to import by sea. To her, therefore, the right of capture presents, in this respect, a peculiar danger, a fact which she has used with good reason as an argument in justification of her claim that maritime supremacy should be hers of right. Because, however, of the protection afforded by her navy, the effects of the right of capture upon prices of food in Great Britain have not been important enough in the present war to affect the strategic situation. By keeping the seas open, the Allies have been able to import foodstuffs at will, so that the continued high prices in France and the United Kingdom are to be credited principally to other factors than the liability of French and British vessels to capture.¹⁴ At the same time, so strict has been the Allies' blockade of

¹³ See, for contrary views upon the question of the illegality of payments by British insurance companies to alien enemies, a leading article in the *Manchester Guardian*, July 4, 1913, which deals with a statement of Sir Edward Beauchamp, Chairman of Lloyd's, to the effect that "all such contracts will be faithfully carried out during war as in time of peace," and an article by N. Bentwich, "Trading with the Enemy," this JOURNAL, Vol. 9 (1915), pp. 352-372.

¹⁴ Ed., "Trade in War Time," *The Political Quarterly*, No. 7, March, 1916, pp. 99-121.

German and Austro-Hungarian ports, and their supervision of trade to adjacent neutral ports, that Germany was compelled early in 1915 to place under government control the distribution of the supply of grain and flour.

It is fair to assume the possibility of conditions in which, being confronted by a combination of maritime Powers of greater strength, Great Britain would find the harassing of her commerce in food supplies much more inconvenient, in fact extremely dangerous. War with a country possessed of a large fleet and ordinarily the source of a large part of British supplies of grain and meat would present such a situation. It is obvious, however, that only by a blockade of her ports could Great Britain be starved into submission. So that while the possible shortage of foodstuffs is for Great Britain the most serious element in the question of capture, it is more to be feared as an influence tending to excite panic than as one likely to become an actuality of sufficient importance to compel discontinuing military operations.

(4) The relation of the question of capture to contraband, blockade, and continuous voyage was dwelt upon at the Second Hague Conference. The recognition of the results of practice during the previous fifty years prevented the delegates of certain Powers, to which immunity was desirable in principle, from voting in favor of a proposal which they knew would be ineffective in practice. Boeck had foreseen the difficulty when he wrote: "It is useless to establish the principle of the inviolability of private enemy property at sea in positive international law, if the limitations which contraband of war and blockade impose upon that principle must be aggravated beyond measure by the doctrine of continuous voyage."¹⁵

The extended application of the concept of blockade, with its modern corollary, continuous voyage, present special advantages to Great Britain as being the means whereby she can use her superior naval power to offset the advantages of overland importation which continental states enjoy. To Great Britain the right of capture would be reduced, if the application of the principles of blockade and continuous voyage were rendered impossible, to the smaller value which

¹⁵ Charles de Boeck, *op. cit.*, p. 695.

it has for France or Germany or the United States. On the other hand, the abolition of contraband is favored in England, since that would assure to Great Britain supplies of food and munitions.

To continental states the abolishing of capture is a desideratum in itself (since the presumption must be that the British navy will always be able to do a proportionately greater amount of injury through capture than will its opponents), but one more to be favored if blockade is simultaneously outlawed. To render shipping inviolable on the high seas would be to perform a service of small value to Germany or France so long as a hostile blockade could be placed in operation, not only before their own ports, but virtually also before the ports of neighboring neutral countries.

The reluctance of continental Powers to consent to the abolition of contraband is likely to diminish in view of the tendency to regard the destruction of prizes as the normal alternative to be adopted by a belligerent whose opponent has gained practical command of the sea. Under a regime of destruction the non-contraband character of neutral goods carried under the British flag is a matter of indifference to the captains of hostile commerce destroyers. Should any considerable bulk of British commerce come to be carried in foreign vessels, the possibility of profitable destruction would proportionately decrease, and with this the interest of continental states in a contraband list that should contain foodstuffs and raw materials would again increase.

The contraposition of the major interest of Great Britain in the abolition of contraband and that of the continental Powers in the abolition of blockade appears to present the opportunity for a compromise which would render it possible to abolish capture with the reasonable expectation that such action would have practical effect. The outlook is the more encouraging in that the Second Hague Conference did not discuss the ways and means of meeting the difficulty which the continuance of contraband and blockade would place in the way of any attempts to render the abolition of capture effective.

(5) The history of the steps by which inviolability has been secured for certain classes of private property in war at sea has always illustrated the conflict between belligerent and neutral interests. At

no time since the Declaration of Paris, by which the neutral flag was permitted to cover any non-contraband cargo, have neutrals been able to render secure the validity of this safeguard. The sincerity with which they have upheld the law when neutrals has been belied by their actions when themselves at war. Even when, as neutrals, they have protested successfully against encroachments, they have not hesitated when themselves belligerents to extend the practice of the same or similar limitations upon neutrals.

The British argument at The Hague in 1907 presented the abolition of contraband as a measure that should be taken in the interest of neutrals. During the present war Great Britain has exhibited a willingness to preëempt rather than confiscate conditional contraband; similarly she has requisitioned enemy goods and released neutral goods captured while destined to blockaded ports. If it must be admitted that the belligerent who extends the contraband list and enforces the principle of continuous voyages is acting within his rights as interpreted under the necessities of modern warfare, these moderations of penalty are demanded in the interest of neutrals and are to be regarded as the logical corollaries of the expansion of the belligerent field of action, and it should be within the province of neutrals to assure their permanence.

The publicists of all countries urge consideration for neutrals, dwelling upon the economic interdependence of states and pointing out that the danger of making enemies of neutral Powers increases directly with the amount of interference with their trade. Great Britain has found it expedient to compensate neutral owners for the destruction of their innocent cargo with enemy merchant vessels, a standard of procedure which no other country has yet adopted. In the light of practice, however, the conclusion is inevitable that belligerents unfailingly have subordinated neutral rights to their own interests. The situation of the Declaration of Paris today demonstrates that in previous wars, as well as in that now being waged, neutrals have been inclined too readily to acquiesce in the progressive degradation of their lawful rights.

The investigation of practice and the evaluation of recent tendencies toward or away from immunity for private property from

capture at sea lead to the same conclusion. The record of practice has exhibited during the last half-century the tendency to treat enemy commerce as a unit; the abolition of privateering, which removed the grossest form of private booty-getting, has indeed been followed in several states by the abolition of prize money, but also, among the maritime Powers, by the extension of the traditional belligerent rights; the devising of supplementary means for rendering the older rights effective; and the consolidation of old and new limitations upon commerce into what have been termed "systems" for the control of all trade which may contain possibilities of assistance to the enemy. "Control" rather than "destruction" is the object of such a system in its complete development, making possible the separation of enemy from neutral commerce, the requisition of enemy and the release of innocent neutral property. The willingness to apply a policy of indiscriminate destruction must be regarded as having been evoked by the necessity that knows no law. Such a policy, however, displays the realization of the importance of attacking enemy commerce in its entirety, of disregarding the value of individual prizes, and of hesitating at no measure calculated to assist toward strangling the enemy by economic pressure.

Partisans of immunity continue to discuss the question as concerned only with capture. The weight of their argument is now being directed, however, toward demonstrating the impracticability of the right of capture, rather than its inconsistency with theoretical justice. This continued attack upon capture *per se* is justified, perhaps, as an attempt to obtain half the loaf where the whole loaf is beyond the possibilities of the moment. It fails to convince because it takes as its starting point the Declaration of Paris — which has been effectually abrogated in practice — and because it fails to appreciate sufficiently the attitude which nations possessed of considerable maritime power have come to adopt toward enemy commerce.

Governments, if their own relation to the development of this attitude has been sometimes unconscious, realize that the attitude exists and interpret the question of capture with that fact in view. It is true that to all states capture presents its own aspects of benefit and injury. It has seemed to the writer that Great Britain would

be justified, on considerations of selfish interest, in desiring the practice contemplated by the Declaration of Paris; and that, conversely, states to which war with Great Britain is not an impossible consideration are consulting their own interests in favoring the abolition of capture. The most efficient navy must in the nature of things accomplish the greatest injury to enemy commerce. Capture, if the Declaration of Paris were observed, would become a less decisive factor, but one that would be most effective, in the hands of the navy which could most nearly interdict the use of the sea to its enemy's fleets of war.

The situation that exists demands, however, that governments so shape their policies as to ensure that whatever advance in principle is accomplished shall be made effective. Accordingly we find that the proposition of immunity has received within the last decade a wider interpretation in parliamentary discussion and international conferences. Henceforth it can hardly be considered except in relation to the various elements—blockade, contraband, continuous voyage, visit and search, war zones—that are capable of being incorporated with the basic element, capture, into "systems" for the "control of enemy trade," systems designed with the object of disorganizing utterly the economic life of an enemy state.

Reviewing the history of capture, estimating the value of existing legal limitations upon it, regarding the nature of foreign trade, recognizing the varying interests of states, estimating the effectiveness of maritime operations against commerce in the present war, one is inclined to ask whether the Declaration of Paris did not grant a degree of immunity greater than the spirit and conditions of the period justified. Assuredly certain of the means which have been taken to evade its rules have been defensible in reason to an extent that has baffled the efforts directed toward maintaining them in effectiveness. It is this consideration that deprives the situation of a discouraging aspect from the standpoint of international law. That one result of the tendency toward an adaptation of the rules of warfare to changed conditions has been that the trend today appears to be away from the realization of immunity for private property from capture at sea is a consideration of minor importance if at the same

time a just equation of relative advantage has been preserved between belligerents. Assuming that neutral interests also must receive consideration, and granting that they have not been adequately protected, it is inevitable that, while resort to war continues, accepted rules will have to be revised in the light of circumstances unforeseen at the time of their formulation. The principle of immunity is far from being realized in practice today, not because belligerents choose to disregard the rules of international law, but because under present conditions the destruction of an enemy's trade in its entirety appears to constitute an object of warfare of the first importance. So long as that attitude persists, there will be necessary a work of reconstruction which will select and legalize those extensions of practice which are consistent with the progress of international law and will reject other extensions the operation of which is contrary to progress.

HAROLD SCOTT QUIGLEY.

THE HELLENIC CRISIS FROM THE POINT OF VIEW OF CONSTITUTIONAL AND INTERNATIONAL LAW

PART I

It is not the broad-chested and broad-backed men that are the safest, but those who think well prevail everywhere. Thus the broad-ribbed ox is driven in the path-way by a little whip. — Sophocles, *Ajax*. 1248-52. *

THE Hellenic crisis which, from the beginning of the European War up to the present time (December 15, 1916), baffled all political calculations and brought Greece to the very verge of destruction, is principally due to the fundamental difference in the conception of the Constitution by the King of the Hellenes, on one side, and the Hellenic nation, at large, on the other. This divergence of views between sovereign and people, in general, not only resulted in an internal upheaval and external pressure culminating in a forcible intervention, but also left a stigma on the country on account of the violation of solemn treaty obligations.

But the ruler of Greece and his ministers, who execute the orders of their King, not only repudiate the charge of the alleged violation of the provisions of the Constitution and the obligations of a treaty, but claim that although, as a matter of fact, they observed a "benevolent neutrality" towards the Quadruple Entente, as promised, and strict neutrality towards the Teutonic Powers and their satellites, as the rules of international law prescribe, the territory of their country was occupied or invaded by both sets of belligerents, followed by various acts of spoliation. The former, namely, the Allies, pretend that their initial occupation of Greek territory was done at the invitation of the Greek Government of the time, and that the subsequent occupation and the other coercive measures were due to the unneutral conduct of the Greek King, acting through his nominees,

* An allusion to the physique of King Constantine and the wisdom of Mr. Venizelos

the Ministers. The latter, namely the Central Powers and their allies, allege that, being entitled to an equal treatment by Greece as a neutral state, the invasion and occupation of Greek territory is justified. In other words, the Teutonic group contend that as Greece willingly or unwillingly allowed the use of her territory to their enemies as a base of military operations against them, they also have the same right to utilize such territory for the same purpose.

The questions which will, therefore, be here examined are:

First: Whether Constantine, the King of the Hellenes, violated the Constitution of the country, setting thereby at naught the liberties of the people, and imposed his personal policy, both in the internal and external affairs of Greece.

Second: Whether the King and the Government installed by him after the fall of the Cabinet presided over by Mr. Venizelos, by refusing to afford military assistance to Serbia when the territory of the latter country was invaded by the Bulgarian army, violated the obligations arising out of the treaty of alliance between Greece and Serbia.

Third: Whether the occupation and use of Greek territory by the Allies for military purposes and the forcible measures taken by them against Greece, and the invasion of such territory by the Central Powers and their supporters, and the consequences resulting from it, are justifiable either by reason of a treaty obligation or unneutral conduct on the part of King Constantine's Government.

The first question is connected with constitutional law, the second and third concern international law. They will therefore be examined in their order.

But in order to comprehend the questions at issue, it is necessary to review shortly the historical development of the Constitution of Greece and the events which gave rise to the Hellenic crisis, resulting in the formation of the Provisional Government now established in the capital of Macedonia, namely, in Salonica.

Any one conversant with the history and social life of modern Greece cannot but be struck with a national characteristic of the Hellenic people, that is, their intense love of political and personal liberty, and, as a consequence, their resentment toward anything

tending to the curtailment of that liberty in any shape whatever. In fact, the Greek War of Independence (1821-1828) aimed not only at the shaking off of the Turkish yoke, which was weighing heavily upon them, but also at the creation of a state in which the nation could enjoy every possible freedom, be it political or individual. In short, the great rebellion of the Hellenic nation against the Ottoman Empire — a revolution great for the sacrifices which it entailed and the deeds accomplished — strove to create a body politic which should not only be independent internationally, but also be governed by liberal institutions. This is attested by the history of the people, both before and during the struggle for their political emancipation from the Turk, and is also proved by the events after the establishment of the Hellenic state.

Thus, when the first national assembly of the Greek insurgents met shortly after the rising at Epidaurus (or near that town) in January, 1822, in order to frame a constitution for the future state, it issued a proclamation in which, after declaring that the Hellenic nation could not longer remain "under the horrible Ottoman rule" and "bear the heavy yoke of tyranny" of which "there was no parallel," asserted its political independence. The tentative constitutional charter, which was then framed, known by the name of "Constitution of Epidaurus," guaranteed to the citizens of the new state the equal protection of the laws and liberty of conscience; it abolished slavery, then a Mohammedan institution, practiced in truth only by Mohammedans, and adopted liberal resolutions for the safeguarding of personal freedom.¹

This assembly by another declaration, after indorsing the principle of the French Revolution which asserted the "natural, immutable and sacred rights of humanity," called the newly created state the "Provisional Government of Greece" instead of Republic, contrary, it seems, to their wishes and inclinations. The reason for this reserved attitude of the Greek revolutionists was due to the aversion to anything tending to political freedom then prevailing in the Continent

¹ S. Tricoupis, *Istoria tis Hellenikes Epanastascos*, Vol. II, p. 106 (ed. 1888); see also N. Saripolos, *Das Staatsrecht des Königreichs Griechenland (Das Öffentliche Recht der Gegenwart)*, Vol. VIII, p. 12).

of Europe. In fact, the diplomacy of the time was still under the spell of the evil genius of Prince Metternich, seconded by the abhorrence of Alexander I of Russia to encourage rebellion of any kind.²

During the war of the revolution, namely, in May, 1827, the national assembly which met at Troezena and elaborated a "final constitution" for Hellas, declared by one of its provisions that "sovereignty had its foundation in the nation," that "all power is derived from the people," and that "it only exists for the people." In a word, the members of that assembly who were reflecting the national will, were entirely inspired by the principles of the French Revolution in regard to the foundation of government, and followed the maxims embodied in the liberal Constitution of France of September 3, 1789³ and, to use the immortal words of Lincoln, the Greek revolutionists had then created a government "of the people, by the people, for the people."

After the famous battle of Navarino (October 20, 1827) — second only to that of Lepanto (October 7, 1571) — in which Christianity triumphed for the second time in the Ægean waters over Mohammedanism, the creation of an Hellenic state, or its resurrection, became a reality. A year after that "untoward event," — to use the words of the King's speech at the opening of Parliament, inserted in it by the Duke of Wellington, — the representatives of the Greek nation, who met again at Poros in December, 1828, in order to deliberate on national affairs, fearing that the Governments of the three allied courts, namely, France, Great Britain and Russia, might, on account of the then existing attitude of Europe toward national movements for constitutional government as exhibited in the famous congresses of the time, such as those of Troppau, Verona and Leybach (which are

² On July 20, 1825, the clergy, the representatives of the nation, and the naval and military chiefs in their appeal to England said that they had taken up arms in defense of mankind's natural and imprescriptible rights to freedom of property, religion and liberty. It was on account of the desperate condition of the revolution at that time that the Greek nation wished to place themselves under the protection of Great Britain, and solicited the nomination of an English prince as their sovereign. "The Greek nation," they said, "places the sacred deposit of its liberty, independence, and political existence, under the absolute protection of Great Britain." Napulia, July 20, 1825. — H. H. Parish, *the Diplomatic History of the Monarchy of Greece*, ed. 1838.)

³ Saripolos, *ibid.*, p. 5.

wrongly ascribed to the Holy Alliance) prevent Greece from framing a constitution on liberal ideas, addressed a petition to the Cabinets of the three Powers, in which referring to proposition of the Powers to establish an hereditary monarchy in Greece, they reminded their protectors that even under the Turkish rule they elected their own municipal magistrates; that for eight years (during the revolution) the representative principle had predominated amongst them in their different organizations, and in a manner associated with their new existence, that, therefore, "the representatives think it would be both unjust and dangerous to deprive them of it." "But it may be expected," they continued, "that by combining this principle with that of hereditary succession to the supreme power, the desires of the Greeks would be amply fulfilled." ⁴ Be that as it may, by the Protocol of the Conference of London of February 3, 1830, signed by the representatives of Great Britain, France and Russia, which created the Hellenic state, it was declared that "Greece shall form an independent state and shall enjoy all the rights — political, administrative, and commercial — to complete independence," and that "the Greek Government shall be monarchical and hereditary." ⁵ This Protocol was subsequently ratified by the Convention of May 3, 1832, according to which the same Powers agreed (Art. IV) that "Greece, under the sovereignty of Prince Otho of Bavaria; and under the guarantee of the three courts, shall form a monarchical and independent state." ⁶

It should be here candidly stated that, notwithstanding the heroic struggle and the untold sacrifices which the seven years' war of independence entailed, it is doubtful whether the Greek state could then have been created without the military and naval assistance of the three protecting Powers. It is important to bear in mind this fact on account of its connection with the question we are here examining, and the events which are now happening in Athens. Another fact which should not be overlooked is that in the creation of the Hellenic Kingdom in the beginning of the nineteenth century, the sovereigns and the statesmen of the time, and particularly the people, were

⁴ Hansard's Parliamentary Debates, Third Series, Vol. 71, p. 794.

⁵ Hertalet, Map of Europe by Treaty, Vol. II, p. 841.

⁶ *Ibid.*, pp. 893-895.

swayed more by sentiment than by interest. France and England were actuated by a reverence for classical Greece, and also by reason of humanity; and Russia was moved by religious feelings and political calculations; and although the policy of the same Powers towards Greece is now guided more by interest than by sympathy, the sentimental side has not yet disappeared.

It is not necessary for our purpose to dwell on the vicissitudes of the new state in the early days of its independence, nor on the abortive attempts of one of her distinguished men (Capo d'Istria) to establish in Greece a centralized system of government. Suffice it only to say that whilst the National Assembly which met at Pronia in August, 1832, was framing a new constitution on democratic lines, its representatives were courteously informed by the three Powers that they would consider their decisions as null and void unless their newly elected King (Otho) would coöperate with them. This warning was heeded by the Assembly adjourning their sittings until the arrival of their sovereign.⁷

King Otho arrived in Greece in the beginning of the year 1833, and as he was not yet of age the Regents appointed by his father (the King of Bavaria) administered the country during his minority. The first act of the Bavarian Regents was to issue a proclamation to the people, at the head of which document the words "Otho by the grace of God King of Greece" were conspicuous.⁸ As it afterwards appeared, these words were placed in the proclamation intentionally in order to claim a divine right for the King of Greece. In fact, on becoming of age, Otho issued a new proclamation in which the same words were inserted in it.⁹

A distinguished English historian, and an eye-witness to these events, alluding to this incident, writes: "The title assumed by Otho, 'by the Grace of God, King of Greece,' excited a few sneers among those who were not republicans; that one of his regents had declared that he exercised absolute power by order of King Otho,

⁷ Saripolos, *ibid.*, pp. 6-7.

⁸ See text of Proclamation in Epaminondas J. Kyriakides, *Istoria tou Singchronou Hellenismou* (ed. 1892), Vol. I, pp. 242 and 243.

⁹ Kyriakides, *ibid.*, p. 283.

and that the King of Greece exercised a right for which he was responsible to no one." He adds that "this assertion was directly at variance with the promises of the King of Bavaria and the three protecting Powers."¹⁰ Evidently history repeats itself, as King Constantine also claims that he reigns by divine right.

King Otho, therefore, imbued with such ideas about the origin of his royal authority, following in the footsteps of his Regents, governed or misgoverned the country as an absolute monarch, concentrating all power (as the present King of Greece) in his hands.¹¹ This system of government was bitterly criticized, not only by the people in Greece, but also by their friends and protectors in Europe. It particularly attracted the attention of the British Parliament and the public generally in England.

That the three Powers who sent Otho to Greece never intended that he should establish there an absolute monarchy, ruling by the so-called Divine right, is proved by the utterances of British public men both before and after the election of Otho as King of Greece. Thus, Lord John Russell, speaking in the House of Commons in February, 1830, on the behalf of the Opposition on the affairs of Greece said:

There are one or two points with regard to the settlement for Greece. . . . The first regards the form of government that is intended to be established in Greece. On this point there have been sinister rumors circulated with respect to the intention of the Allied Powers, who, it was said, intended to introduce a despotic Government in Greece. I am happy to say that these rumors have been dispelled by the declaration recently made by one of the Secretaries of State. At the same time I feel as an Englishman, and as a citizen of a free country, that as a new state is to be established, freedom — political freedom — should be a constituent part of the principles on which its government is to be established.¹²

Sir Robert Peel, who was at that time a member of the Cabinet and, in the words of a distinguished English historian, "perhaps the

¹⁰ George Finlay, *History of the Greek Revolution*, Vol. II, p. 289. Also Finlay, *History of Greece*, Vol. VII, p. 106, ed. 1877.

¹¹ Finlay, *History of Greece*, Vol. VII, p. 168.

¹² Hansard, new series, Vol. XXII (February–March, 1830), pp. 545–546.

most sagacious Minister of the 19th century,"¹³ answering Lord Russell, said, "I can assure the noble Lord that in the arrangement, the bases of which have been laid by the Allies . . . no attempt has been made to dictate despotic monarchy to Greece." Then alluding to the interest shown by the previous speaker (Lord Russell) for the welfare of Greece, he said:

I join with him heartily in the earnest wish he has expressed that the Greeks of the present day may recover from the torpor of long slavery and be enabled to emulate the glory of their predecessors, while at the same time they enjoy all the advantages that arise from the progress of knowledge and from the establishment of those institutions which in happy countries like this are calculated to ensure the possession of civil and religious liberty.¹⁴

Lord Palmerston, then also echoing the voice of the House, said

He hoped that as they would have the pleasure of seeing what could not fail to be gratifying to the national feelings and flattering the honor—to collect from the lips of the English Minister that the people of Greece would enjoy the rights of freemen, and be no longer confined in the shackles and fetters of despotism.¹⁵

Lord Palmerston, a few years after (1836), speaking again in the House of Commons on the affairs of Greece, said: "A man must be blind to the natural character of the Greeks, as well as to the geographical distribution of that country, if he thinks that Greece can be governed without a representative assembly—it is an indispensable addition to the kingly government." Then alluding to a criticism about the inability of the Greeks to have representative government, he said: "It is a great mistake to suppose that Greece is not in possession of the basis of freedom."¹⁶

¹³ Sir Spencer Walpole, *The History of Twenty Years*, Vol. I, p. 13.

¹⁴ Hansard, new series, Vol. XXII, pp. 550–556.

¹⁵ Hansard, new series, Vol. XXII, p. 560. Lord Landsdowne, expressing his feelings on the subject in the House of Lords, said he "wished that the measures which were to be taken for the pacification of Greece would be calculated to make her happy and independent, for if independent, she must be essentially free and strong." (Hansard, new series, Vol. XXII, p. 54.)

¹⁶ Hansard, Vol. XXXV, Third Series, p. 636.

As the rule of King Otho¹⁷ continued to be both bad and despotic, the affairs of Greece continued more and more to attract the attention of the Powers who were responsible for the installation of the German Prince on the throne of that state. It would be out of place here to describe the evil results of the Bavarian administration. Suffice it only to say that within a few years it brought chaos and anarchy in the country. It was, therefore, not surprising that the European chancelleries were again seriously concerned with the Grecian situation, as in the present time. In England, the people, as usual, gave vent to their feelings through Parliament. On August 15, 1843, a member of the House of Commons (Mr. Cochrane), in moving for an address for the production of the diplomatic papers concerning Greece, appealed to the House to interest itself in the internal troubles of the Kingdom, due, he said, to the violation of the pledges given by King Otho "for the safeguarding of the liberties of a people and of a country to which civilization owes so much. . . . Nor does it shame me to declare," he added, "that all we have acquired has been transmitted to us by those arts and sciences which are the monuments and memorials of Greece." He asserted that the British Government was bound to see the pledges given by Bavaria fulfilled. "But, Sir," he said, "I would appeal to this House by higher considerations than classical associations and political interests . . . I appeal to you by your national faith and national honor; by pure principles of right and wrong, which are immutable." Then recapitulating the diplomatic instruments in connection with Greece, to which England was a party, he said: "Although it be admitted that her happiness and welfare cannot affect your power, yet will you, by permitting a continued violation of these treaties, suffer the greatest of all injuries — a loss of your character for consistency and integrity among nations."¹⁸

Lord Palmerston, who rarely missed an opportunity to take part in the discussion of foreign affairs, — and to whom Mr. Gladstone always looked for guidance on such matters, as he once said in the

¹⁷ "It is curious," says an English writer, "that a Prince, who was destined by his royal father (the King of Bavaria) to be a priest . . . and, in due time a Cardinal, developed into an absolute Monarch." (Blackwood's Magazine, September, 1843, p. 545.)

¹⁸ Hansard, Third Series, Vol. LXXI (July-August, 1843), pp. 797-798.

House of Commons — made some observations in regard to the character of the Greeks and their political aptitude for representative government, which may not be amiss to reproduce on account of their bearing on the present situation. He said:

I seize the opportunity of making some general observations on the character of the Greeks. . . . I venture to suggest . . . that when a people begin to complain openly of the inconvenience which they suffer from the measures of a Government, it is proof that they have made some progress in political and civil liberty. . . . Nothing is more remarkable in the history of the human race than the fact, that the inhabitants of particular portions of the earth appear to retain for long periods of time their peculiar character, varying only according to the circumstances under which they happen to be placed. The Greeks of the present day retain many of the high intellectual qualities which led the former inhabitants of their country to the pitch of civilization which they attained.¹⁹

We could complete the observations of the distinguished English statesman by adding that, if the Greeks inherited some of the good qualities of their forefathers, they also inherited some of their defects, the principal amongst them being disunion, and political passion carried to the highest pitch of personal enmity, to a degree that often general interests are blindly sacrificed on account of individual hatred, resulting in the ruin of the country. The present political strife in Greece, fostered by the King, is akin to many similar internal upheavals which ruined ancient Greece and has brought so many calamities to modern Greece ever since her independence. The short civil war during the revolution of 1821–1828 at the most critical time of that great struggle, and the present anarchy, when the very existence of the nation may be at stake, are conspicuous examples confirming the correctness of these observations.

The great commoner (Lord Palmerston) admitted that the pledges given by King Otho for a constitutional government were violated by him, and added that as far as the British Government was concerned, it endeavored to induce the King of Greece to fulfill his promise.²⁰

Sir Robert Peel, then Prime Minister, in indorsing the observations

¹⁹ Hansard, Vol. LXXI, pp. 798–799–800.

²⁰ *Ibid.*, p. 802.

of Lord Palmerston and the other speakers as to the interest taken in England for Greece, said:

I think it is impossible for any inhabitant of a country in which civilization has made progress to profess indifference for the fate of Greece — a country to which we owe all civilization and attainments which are not connected with the Christian dispensation. Independently, however, of those considerations, Greece must always be an object of interest. From her geographical position the internal tranquillity of Greece must necessarily exercise an important influence on the general tranquillity of Europe.

Then referring to the criticism as to the inaptitude of the Greeks for self-government, he said:

I concur in the sentiment expressed that we ought now less to revert to the past, than to consider what may best secure the future progress and prosperity of a people of whose ultimate fortunes we certainly ought not to despair. We must recollect the despotism of centuries to which they had been subjected; and if on being rescued from that despotism, they should not at once manifest those capacities for the arts of government, which are peculiar to the inhabitants of more favored countries, we ought to consider the circumstances from which that incapacity for the arts of government may be supposed to have arisen.²¹

In France, the interest shown for Greece, both during and after the revolution, was summarized in sympathetic words by the illustrious Guizot as early as 1833. Speaking in the Chamber of Deputies on behalf of the Government and referring to the policy of France towards Greece during the war of Greek independence up to the formation of the Hellenic state, M. Guizot said:

That policy was adopted by the country; it was due to the French sentiment; it was counselled and dictated by the general state of the spirit in France; it was the country that first demanded that Greece should be assisted; that she should be assisted with money, through diplomacy, with men; that she should be helped on one side in order to free herself from the Turks, and on the other to be constituted into a durable and independent state. . . . I do not hesitate to say that it was a policy at the same time moral and French, useful to the general cause of civilization and to the particular cause of the influence, of the power of the country.²²

²¹ Hansard, Vol. LXXI, pp. 805-808.

²² Guizot, *Histoire Parlementaire de France*, Vol. II, pp. 158-159.

During the revolution of 1843, which led to the dethronement of King Otho, the French Government did not seem to be very enthusiastic about the introduction of a constitutional régime in Greece, considering, rightly or wrongly, that that was not the *panacea* which would cure the ills of Greece, but good administration. Thus, M. Guizot, speaking again on the affairs of Greece in the Chamber on July 1, 1843, now as Minister of Foreign Affairs, said that "France has only one interest in Greece, that is that the Greek state should last, that it should strengthen itself, and prosper." Pointing out the difficulties which were then in the way for the success of this policy, he said that "we meet three obstacles: One is the rivalry of parties, of factions, of internal '*coteries*'; the other the rivalry of foreign influences in Greece; the third is the imperfection . . . of the Greek administration."²³

Speaking again on January 21, 1844, and referring to the advice then given by the French Government to King Otho to keep the promise which he had given to the people to grant a constitution, M. Guizot concluded his remarks with the following philosophical sentences, which may well apply to the present King of Greece and other sovereigns: "Faith to obligations, respect to the word that one gives is a salutary example which should always descend down from the throne, and which sooner or later conduces to the benefits of the great and real interests of Royalty."²⁴ On March 19, 1846, M. Guizot, speaking this time in the upper house, reiterated that France and also England desired the development and prosperity of Greece and of her constitutional monarchy.²⁵

According to eye-witnesses and other foreign critics, King Otho had then become his own Prime Minister, and, in the words of an historian²⁶ who was at Athens at the time, Otho "strove to concentrate all power in his own hands" and "expected that his personal popularity and King-craft would prevent insurrections. . . . He at-

²³ *Histoire Parlementaire*, IV, p. 153. The same views are expressed in his *Mémoires*, Vol. VI, p. 262.

²⁴ Guizot, *Hist. Parl.*, IV, p. 184.

²⁵ *Ibid.*, p. 167.

²⁶ Finlay, *History of Greece*, Vol. VII, p. 168. See also *Blackwood's Magazine*, September, 1843, p. 345.

tempted to govern without the advice of his Ministers"; and "he only assembled cabinet councils in order to obtain the formal ratification of measures already prepared in his own closet." One may ask, what more does King Constantine now do, with the exception that he is preparing an army to strike the benefactors of his adopted country. As Finlay well observes, King Otho (in the same way as King Constantine at the present time) "refused to listen to the voice of nations, and remained loitering with fatuity on the brink of a precipice."²⁷

The result of this despotic government was a revolution against the King, with a peremptory demand for the grant of constitutional government on September 15, 1843. As Otho's appeal to the protecting Powers — who guaranteed a monarchical form of government for Greece — for assistance to quell the rebellion was not heeded, he was compelled to call a national assembly in order that the representatives of the nation might frame a Constitution for the country.

Accordingly, the representatives of Greece and of the Greek colonies abroad (this was a departure from constitutional usage, as many of those sent by the latter were not even Greek citizens; having met at Athens on November 26, 1843, adopted a Constitution on March 30, 1844, the King taking immediately the usual oath to maintain it faithfully.²⁸

It is curious to note the answer given then by the representatives to King Otho when he sent them a message promising to grant a Constitution. "King," they said to him, "the Hellenic nation during all the period of its sacred struggle for independence have repeatedly, in the acts of their assemblies, indorsed the beneficial principles and safeguards of the constitutional régime."²⁹

The Constitutional Charter of 1844 had a fair trial for a good many years, but as the King, forgetting his pledges, commenced again to rule the country arbitrarily, a rebellion broke out in October, 1862, and while Otho was making a tour of the country, a revolutionary government was formed at Athens and, assuming temporarily the reins of government, issued a proclamation and declared that the

²⁷ Finlay, *Hist. of Greece*, Vol. VII, p. 372.

²⁸ *Ibid.*, p. 177.

²⁹ Kyriakides, *op. cit.*, Vol. I, pp. 467-468.

reign of King Otho had come to an end.³⁰ The action of the revolutionary junta was afterwards ratified by the National Assembly.³¹ This is a precedent which the present Provisional Government will probably imitate. Notwithstanding its assurances that the character of the movement is not anti-dynastic, they will, probably, be forced by circumstances to take the same step as their predecessors of 1862.

As King Otho again asked the three protecting Powers to help him to reassert his authority, the position then taken by these Powers is instructive on account of its bearing on the present situation in Greece in case the Provisional Government headed by Mr. Venizelos declares the Greek throne vacant, as was done in 1862.

The British Secretary of State for Foreign Affairs (Lord John Russell), referring to these events in his dispatch of November 6, 1862, to the British Minister at Athens said that "Her Majesty's Government have learned of these events without surprise; they have long lamented the blind policy pursued by King Otho, and they have long foreseen that it tended, sooner or later, to produce the catastrophe which has now happened." Then referring to the right of the people of Greece to change their dynasty, he wrote: "The Kingdom of Greece having by the transaction of 1832 been acknowledged as an independent state, the people of Greece are entitled to exercise the rights of national independence." "One of the rights," he added, "which belong to an independent nation . . . is that of changing its governing dynasty upon good and sufficient cause."³²

The other two protecting Powers, namely, France and Russia, also abstained from interfering with the Greek people, who had decided to depose their sovereign.

When King Otho returned in October, 1862, to Pheiraeus (the harbor of Athens) he saw the impossibility of continuing his reign and accepted the hospitality of a British cruiser and returned quietly to Bavaria.

³⁰ Kyriakides, Vol. II, p. 172.

³¹ *Ibid.*, p. 234. Also Debates of General Assembly of the Greeks, No. 39, Vol. I, pp. 323-325.

³² See despatch of November 6, 1862, in Parliamentary Correspondence of October, 1862, Nos. 19-20, Vol. 73, 1863.

On April 16, 1863, Lord John Russell, answering the Earl of Malmesbury on a question concerning the affairs of Greece, said:

The people of Greece declared that they would no longer continue under the government of King Otho. . . . They found fault with the government of King Otho, and they acted as this country had acted about two centuries since. With that determination her Majesty's Government had nothing to do. . . . But what had the Greeks done? . . . They declared their determination to have a constitutional monarchy. . . . Surely there was no want of wisdom in that course, supposing that they were right in excluding King Otho.²³

A French writer in an article contributed to one of the leading reviews of Paris (*Le Correspondant*), writing just before the revolution of 1862, says, among other things, that "it was a serious mistake to send to Greece a German Prince to rule over a southern people. There is nothing more opposed to each other than the German and the Greek character: the one is phlegmatic, slow and circumspect; the other ardent, full of passion, and of first impulse." This writer, although a friend of royalty, admits that Otho ruled as an absolute monarch.²⁴

After the deposition of King Otho, the Greek people by universal suffrage elected as their sovereign, October 15, 1862, Prince Alfred of England; but owing to the treaty stipulations of Great Britain with the other two protecting Powers that no member of their respective royal families should ascend the Greek throne, this election was not ratified. One of the reasons for the preference shown to an English Prince was the belief that a member of that royal family would more likely respect the Constitution than any other European Prince. Thus, at the opening of the British Parliament on February 6, 1863, the Queen's speech referred to the election of Prince Alfred as, "this unsolicited and spontaneous manifestation of goodwill towards Her Majesty and her family and of a due appreciation of the benefits conferred by the principles and practice of the British Constitution," which "could not fail to be highly gratifying and has been deeply felt by Her Majesty."²⁵ This view was reiterated in the despatch of the

²³ Hannard, Third Series, Vol. CLXX (1863), pp. 182-183.

²⁴ *Le Correspondant*, January, 1862. F. Lenormant, *La Grèce et son Gouvernement*.

²⁵ Hannard, Third Series, Vol. CLXIX, (1863), pp. 1-2.

Secretary of State for Foreign Affairs to the British envoy at Athens. Thus, Lord Russell, writing to H. Elliot on January 22, 1863, said that "The great confidence felt by the Greeks in the constitutional principles by which Her Majesty has always been guided, has no doubt been the main cause of the spontaneous enthusiasm which has been elicited by the mention of the name of His Royal Highness Prince Alfred as King of Greece."³⁶

It is not necessary here to dwell on the efforts at that time of the statesmen of the three guardian angels, so to speak, of Greece for searching with a Diogenes lamp, an eligible candidate for the Grecian throne. After many wanderings, their eyes fell on the young Prince William of Denmark, who, at their suggestion, was elected by the National Assembly of Greece on March 30, 1863, under the name of George I, Constitutional King of the Hellenes. The members of the assembly who elected King George I, rising exclaimed, "Long live George Christian, the Constitutional King of the Hellenes!"³⁷

Here again the British Government showed its solicitude for the introduction of liberal institutions in Greece. Thus Earl Russell instructed the British envoy at Athens to declare to the representatives of the National Assembly that "Her Majesty's Government trust, in the selection of a sovereign to rule over Greece, the Greek Assembly will choose for their King a Prince from whom they can expect regard for religious liberty, a respect for constitutional freedom, and a sincere love of peace. A Prince," added the Secretary of State, "possessing these qualities will be fitted to promote the happiness of Greece, and will be honored with the friendship and confidence of Her Majesty the Queen."³⁸ And in a subsequent despatch to the same envoy, Lord Russell wrote, "You will at the same time state that it appears to Her Majesty's Government that the first object of the Greeks should be to elect a King who will not set aside the Constitution by

³⁶ Parliamentary Correspondence, 1862, respecting the Revolution in Greece, Vol. 173, No. 144, p. 147, despatch of January 22, 1863.

³⁷ Kyriakides, *ibid.*, p. 234. Also Debates of the General Assembly of the Greeks, No. 40, Vol. II, p. 313.

³⁸ Parliamentary Correspondence respecting the Revolution in Greece, 1862, Vol. 73, No. 107, p. 99, December 12, 1862.

violence, nor prevent it by corruption" (as the present King of the Hellenes is accused of having done).³⁹

It should be noted that the new sovereign of Greece was elected as Constitutional King of the Hellenes, and not merely as King of Greece, as formerly, and that in the letter of acceptance of the throne by King George I, the words "by the grace of God" did not appear as in that of King Otho.⁴⁰

The newly-elected King of the Hellenes arrived in Athens on October 30, 1863, and a year after, namely, on October 31, 1864, he signed and approved the new Constitution adopted by the National Assembly. In his proclamation to the Greek people he declared that he would maintain the laws of the country and particularly the Constitution, which is, he said, the cornerstone of the Hellenic Charter.⁴¹

The reason for the change of the former title from "King of Greece" to that of "King of the Hellenes," should be ascribed principally to the Belgian Constitution, which the framers of the Greek Constitution of 1864 followed, in some parts even *verbatim*, the sovereign of Belgium being also called "King of the Belgians." But the origin of this title is naturally ascribed to France, where it was adopted for the first time during the eventful years toward the close of the eighteenth century. It was the Constitution of France of 1791 which first gave to the French sovereign the title of "King of the French." The Constitutionalist of that day considered that their sovereign by the assumption of that title would become a King by the national will. In 1830 we find again another French sovereign (Louis-Phillipe) assuming the same title which, according to the words of a distinguished French writer, is considered "as a contract entered into between him (the King) and the representatives of the nation."

For the same reason both Napoleon I and Napoleon III had the title of the "Emperor of the French" in order to show that they were the representatives of the national will.⁴² Professor Duguit is of

³⁹ *Ibid.*, No. 144, p. 147, despatch of January 22, 1863.

⁴⁰ Kyriakides, Vol. II, p. 234 and 245 note.

⁴¹ *Ibid.*, p. 257.

⁴² L. Duguit, *Traité de droit Constitutionnel*, Vol. I, pp. 397-398.

opinion that all this is a fiction, and that there is a contradiction between national sovereignty, on the one side, and an hereditary monarchy on the other. Professor Saripolos, of the National University of Greece, also tells us that the meaning of the title "King of the Hellenes" is that "the sovereign dominion over the territory is denied to him" and that the King is "the leader of the sovereign people."⁴³ The popular view, however, of the Greek people as to the title "King of the Hellenes" is that by the assumption of that title the King of Greece becomes, if only in theory, the King of all the Greeks in *Grecia irredenda*, or of the "unredeemed or enslaved Greece" according to the Greek expression. Be that as it may, the Turkish Government, as soon as it was informed that such would be the title of the new king, objected to it;⁴⁴ but evidently having received assurances from the Powers as to the true meaning of the title, did not insist upon its objection.

It should be borne in mind that King George I, the father of the present King of Greece, was not placed upon the throne of Greece merely by the will of the Greek people, but by the choice and at the suggestion of the three protecting Powers. Besides, these Powers placed certain limitations both as to the person of the sovereign and as to the form of the state over which he was to rule. One limitation is, so to say, as above explained, a self-denying ordinance, namely, that the King of Greece shall not be a member of their respective royal families; the other is that Greece shall be a kingdom, with the *proviso* that it shall be constitutional.⁴⁵

Another point worthy of notice is that the Powers do not guarantee to the sovereign of Greece that he or his descendants shall continue to rule if the people object and overthrow him. As above explained, the three Powers did not intervene in favor of King Otho when he was dethroned. This view is evident also from the declaration made in the Protocol of May 27, 1863, relative to the succession to the Greek

⁴³ Saripolos, *op. cit.*, p. 14, note 6.

⁴⁴ Kyriakides, II, p. 235.

⁴⁵ See Protocol of May 16, 1863, and that of May 27, 1863, Hertslet, *ibid.*, II, pp. 1535-1537; see also the treaty between the same Powers and Denmark of July 13, 1863, Hertslet, p. 1545. In regard to the title of "King of the Hellenes" see Protocols of August 3 and October 13, 1863, Hertslet, *ibid.*, p. 1563.

throne, wherein these Powers, referring to their agreement to defer indefinitely "the time when it would be fitting to replace Greece under a system conformable to the monarchical principles which it is their interest to maintain in the new state founded by their united efforts," consider themselves "relieved from their trusts by circumstances unprovided for by the convention of 1832."⁴⁶ The concluding remarks embodied in that Protocol are no less important and bear directly on the present issues between the same Powers and Greece:

In conclusion they [the Powers] placed upon record that the events which have recently taken place in Greece cannot affect the firm resolution of their courts by common consent to watch over the maintenance of the repose, of the independence and of the prosperity of the Hellenic Kingdom, which France, Great Britain and Russia contributed to found in the general interest of civilization, of order and of peace.⁴⁷

The most important provision contained in these diplomatic instruments with which we are now concerned is that "Greece under the sovereignty of Prince William of Denmark (namely King George I) and the guarantee of the three Courts, form a monarchical, independent and constitutional state." The same phraseology is used in the Treaty of London of March 29, 1864, between the three protecting Powers, in which they agreed to the incorporation in Greece of the Ionian Islands.⁴⁸ It should be remembered that in the original diplomatic instruments for the creation of the Hellenic Kingdom, the word "constitutional" did not exist.⁴⁹

The "National Assembly of the Hellenes" which ratified the deposition of King Otho and elected King George I as Constitutional King of the Hellenes, elaborated also a constitution founded upon the most liberal principles. Their prototype was, as above explained,

⁴⁶ Hertslet, *ibid.*, II, pp. 1863-1864; see also Parl. Corresp., *op. cit.*, despatch of Lord Russell to Cowley, November 8, 1862, No. 24.

⁴⁷ Hertslet, II, pp. 1863-1864.

⁴⁸ Hertslet, III, pp. 1589-1592.

⁴⁹ See Annex A to the Protocol of the Conference of June 5, 1863, which reproduces a letter of the Greek Government enclosing a decree of the National Assembly of the Greeks proclaiming George I as Constitutional King of the Hellenes; also copy of decree. Hertslet, III, pp. 1542-1543.

the Belgian Constitution of 1832, which derived its inspiration from the teachings of the French Revolution and was drawn principally in imitation of the Constitution of France of September 3, 1791. The Greek Constitution adopted the cardinal doctrine of democratic institutions that sovereignty belongs to the people, and not to any particular individual, no matter how lofty a position such a person may occupy in the state. Thus, imitating the Belgian Constitution (Art. 25) it declared by Article 21 that "all powers are derived from the nation and are exercised in the manner indicated by the Constitution." Another provision indicating the democratic spirit of the Constitution, is that which prohibits the conferring of titles of nobility or distinction on the citizens of Greece (Art. 3). The National Assembly of June, 1911, which revised the Constitution of 1864, left intact the above provisions, because these are justly considered as the cornerstone of its democratic foundation.

From the above brief review of the history of the Greek Constitution and the related diplomatic instruments, it is quite evident to an impartial mind that the Greek nation and her protectors aimed at establishing and maintaining on the classical soil of ancient Hellas, not an absolute monarchy, but a constitutional kingdom, and one of a most liberal type; and while living under the ægis of such a régime, the people expect to derive all the benefits accruing from such liberal institutions, the most important of them being the free choice of their governing body to carry out the national will without any obstruction or arbitrary interference.

It is not necessary for our purpose to deal with the events which almost created a dynastic crisis in 1899. It is sufficient to say that the reasons for that peaceful revolution cannot be ascribed to any tendency on the part of the late King George I to encroach upon the Constitution of the country, but were due to other causes with which we are not here concerned. That event brought to Greece Mr. Venizelos, who, in the course of a few years, impressed his personality not only upon Greece but also beyond the confines of the neighboring states. The two Balkan Wars brought glory to the small Hellenic nation, and high hopes were everywhere entertained that under the rule of King Constantine and the leadership of the Cretan

statesman, Greece would play a prominent part in the Near East, become a center of civilization, and in the course of time, realize the aspirations of Hellenism by completing the national union. It was at that juncture that the present European war broke out, and brought Greece face to face with the problem of peace or war.

At the outbreak of the great war the Hellenic people, both in Greece proper and outside the Kingdom, strongly sympathized with the cause of the Triple Entente. This sympathy was genuine, for no question had yet arisen to reopen the Eastern Question so as to affect Greek interests. The "Sick Man" of the East had not yet stirred. The reasons for this friendly feeling towards France, Great Britain and Russia, expressed both in the press and by the public utterances of the leading men of the country, in and out of Government, were, on one hand, the unjust war of Austria against Serbia, the ally of Greece, and that of Germany against Belgium; and on the other, the traditional attachment of the Hellenic nation to France, its sympathy toward Great Britain, and its gratitude to both these Powers and to Russia for the great services they all rendered to Greece during her war for independence and at various times subsequently. The Minister of Greece in England, Mr. Gennadius, who recently resigned in disapproval of the policy of King Constantine after the scuffle between the Allied forces and the Greek troops in Athens, speaking on January 15, 1915, at the meeting of the Anglo-Hellenic League in London, said:

We are not only in sympathy, but are absolutely convinced and devoted to the cause of England in this great world crisis, because we are convinced that her cause is just and good for the world. We believe that it is for the maintenance of the independence, and the freedom also of the smaller states, and we intend to remain faithful to this policy to the very last, . . . and that moreover, we owe a deep debt of gratitude towards England, and there we will remain faithful at her side.²⁰

Mr. Gennadius, who has since been appointed diplomatic agent of the Provisional Government of Greece in London, remained, it is true, faithful to the cause, but one cannot say the same thing of the Greek Government. Even eight months after the declaration of the great

²⁰ *London Times*, January 16, 1915.

war, *i.e.*, on March 6, 1915, the Greek nation was still in favor of intervention in the war on the side of the Allies. Their Ministers had that day, received a great ovation in Athens, and the British Minister was carried by the people arms high for a short distance.⁵¹

Serbia, on the invasion of her territory by the Austro-Hungarian army in July, 1914, sounded the Greek Government as to their attitude in the circumstances, and after some exchange of views between the two Cabinets, it was agreed that should Bulgaria attack Serbia, the Greek army should invade Bulgaria. It seems that King Constantine had at that time indorsed the policy of his Government, but when Turkey entered the war on the side of the Teutonic Powers and the Governments of the Triple Entente openly declared that that step of Turkey sounded her death-knell, Mr. Venizelos, with his usual farsightedness, perceiving that the entry of that country into the war would result in far-reaching consequences, planned to reconstruct the Balkan League in order to strike a death-blow to the Ottoman Empire and shatter the Eastern dreams of Emperor William II, which are an impediment to Hellenic aspirations. These views were submitted to King Constantine on January 24 and 30, in two memoranda.⁵² The King, it seems, at first approved these plans, but afterwards changed his mind.

In the meantime, as the conduct of Bulgaria began to be suspicious, particularly after her acceptance of financial aid from Germany, Mr. Venizelos abandoned the idea of the Balkan League and proposed to the King the immediate entry of Greece into war on the side of the Allies. The assistance that Greece at that time was asked to give was principally to permit the use of her harbors and territory as bases of military and naval operations of the Allies; and, moreover, she was requested to contribute to the land operations at the Dardanelles with one division of troops. In exchange for those services, Greece was promised the territory of Ancient Ionia on the coast of Asia Minor with an extensive hinterland.

But King Constantine, either because of conviction as to the

⁵¹ *London Times*, March 8, 1915.

⁵² The texts of official documents bearing on the Hellenic crisis will be published in the Supplement to the next number of the JOURNAL.

ultimate victory of the Central Powers, or his wish to further the interests of Germany in general and of the House of Hohenzollern in particular, disapproved the policy of Mr. Venizelos and his Cabinet, which enjoyed the confidence of the nation as expressed through their representatives in the Boulé (the Legislature of Greece). The disapproval of the policy of the Government by the Crown resulted in a ministerial crisis. Mr. Venizelos, following parliamentary usage, tendered his resignation to the King on March 6, 1915, and the premiership was offered to Mr. Zaimis; but, as Mr. Venizelos and his party refused to support him, he refused to form a cabinet. Therefore, a new Government was formed by Mr. Gounaris, the leader of the minority in the Boulé.

Following the suggestion of his new Prime Minister, the King dissolved the Boulé in the hope of defeating at the elections the party of Venizelos; but to the discomfiture of both Sovereign and Premier, the elections which took place in June, 1915, gave Mr. Venizelos a substantial majority. Upon the opening of the Legislature on August 16, 1915, the Government was defeated for the election of President of the Boulé (the Speaker), the Gounaris Cabinet resigned, and Mr. Venizelos again assumed power on August 23, 1915.

The Cretan statesman now naturally thought that the King, in view of the verdict of the country in regard to the foreign policy, would, according to parliamentary usage, bow to the national will and follow or indorse the policy of the new Government and not try to impose upon the country his own personal views, which had been proved to be at variance with the popular sentiment. But King Constantine's views on royal prerogatives were quite different and he adhered steadfastly to his own opinion, which had now become a conviction.

The next disagreement between Sovereign and Premier occurred, it is now known, after the Bulgarian mobilization on September 21, 1915, when Greece also immediately mobilized her army (September 25, 1915). Mr. Venizelos tells us that he had then informed the King that Greece ought to assist Serbia, her ally, as the treaty required, in case Bulgaria should attack that country; that otherwise the mobilization of the army would be financial ruin without any

benefit. But King Constantine insisted on the mobilization of the army, leaving its use to future developments. The Premier promised to remain temporarily in power in the hope of inducing the Sovereign to change his mind.⁵³

Before the invasion of Serbia by the Bulgarian troops, Mr. Venizelos with the approval, it seems, of the King, approached the Ministers of the Allies at Athens as to the possibility of supplementing on their part the number of troops which Serbia was bound by the treaty of alliance with Greece to send against Bulgaria, *i.e.* 150,000 troops, in case the Greek Government decided to go to the assistance of her ally. The Ministers promptly cabled to their Governments the query of Mr. Venizelos, but in the meantime it seems that King Constantine, if he had ever consented to this arrangement, had changed his mind.⁵⁴ On October 2, 1915, the first contingent of the Allied troops landed in Salonica for the purpose of repelling the Austrian invasion of Serbia. The Greek Government lodged a formal protest against the proceedings of the Allies, for reasons which will be hereafter explained.

The final clash between King Constantine and Mr. Venizelos came on October 4, 1915, when the Premier, in answering a question in the Boulé as to what would be the attitude of Greece should its army, in assisting Serbia, encounter the armies of other Powers (meaning those of Germany and Austria), said that he would be sorry if in defending the interests of the country such a contingency arrived. This plainly indicated that the assistance to be given to Serbia could not be limited to a particular belligerent, but would be directed against

⁵³ According to recent accounts, King Constantine had then, without consulting his Ministers, promised Emperor William II that Greece would remain neutral, even if Bulgaria attacked Serbia.

⁵⁴ As this question will be discussed in the second part of this article to be published in the next number, we refrain from giving any details of it. It will then be explained whether this conversation of the Greek Premier with the Ministers of the Allies constituted a covenant justifying the landing of troops in Salonica, or whether the Allies could not have invoked a better title in justification of that proceeding. Another point which will be hereafter discussed is whether the Executive in Greece could bind the country by a measure in which the approval of the Legislature was necessary, and if so, whether it was or was not the duty of the Allies to obtain that assent before landing their troops on Greek territory.

all the enemies of Serbia.⁵⁵ This straightforward statement of Mr. Venizelos, it seems, so aroused the wrath of the King that he immediately sent for the Premier and asked him to resign, which was practically a dismissal. The Premier, although enjoying the confidence of the Legislature, was obliged, on October 5, 1915, to abandon the premiership much to the chagrin of his friends and to the astonishment of the world. This high-handed proceeding of King Constantine was the forerunner of many others which have culminated in the present situation.⁵⁶

After the resignation of Mr. Venizelos, the King again selected

⁵⁵ See sittings of the Boulé of October 5, 1915, in Supplement of *Patris*, Athens, 1915; also, *London Times*, October 7, 1915.

⁵⁶ It was during this interview that King Constantine gave vent to his strange views about his so-called divine right of rule over Greece. He plainly told Mr. Venizelos, when the latter urged him to fulfil the treaty obligation towards Serbia, that he (the King) was prepared to "leave the internal affairs of Greece to the Government," but that "in regard to external relations, he considered himself alone responsible before God for their direction." But the Greek statesman in no less plain language told the Sovereign that he was "enunciating the doctrine of the divine right of Kings with which the Greeks had nothing to do." "Your father," said Mr. Venizelos to Constantine, "was freely elected by the Greek people to be their King, and you are his successor. There is no divine right in that title. It is based on the mandate of the people." (*London Times*, October 11, 1916.) The question has often been asked as to how King Constantine got into his head this peculiar notion of being a sovereign of Greece by Divine right. Some ascribe it to his relationship to Emperor William II; others assert that the King was haunted by such ideas even during his father's lifetime, who vainly, it seems, tried to dissipate this extraordinary conception of his son as to the origin of his future legal rights. But the case of the King of Prussia and the Emperor of Germany is entirely different. The Kaiser claims that his crown was not given to his family, but placed upon the head of the Hohenzollern by the grace of God. Thus, speaking at Coblenz on August 31, 1897, he said that his grandfather (William I) "came forth from Coblenz to ascend the throne as a chosen instrument of the Lord," that "thus he regarded himself," and that his was a "Kingship by the grace of God." (See the *Times*, September 2, 1897. See also speech at Koenigsberg, August 25, 1910, in the *Times*, August 27, 1910.)

That this theory is now obsolete not only in England, but also in the countries of Continental Europe, is the view of various distinguished jurists. Even Blackstone, writing shortly after the middle of the eighteenth century, says that such a title may be allowed "under the theocratical establishment of the children of Israel" (Commentaries, Book I, Chap. 3).

On the other hand, the learned author of the "Law and Custom of the Constitution" (Sir William Anson), in tracing the origin of this doctrine, tells us that when the Reformation destroyed the feudal conception of society, and

Mr. Zaimis for his Prime Minister, who, on October 7, 1915, formed a Cabinet to the liking of the sovereign, and during his Premiership simply carried out the instructions of the King, like all the other Premiers who assumed power after the fall of the Venizelos Cabinet. A week after the fall of Venizelos, *i.e.*, on October 14, 1915, Bulgaria, having evidently received assurances from King Constantine that Greece would not assist her ally Serbia, declared war upon the latter country. The will of the sovereign, in defiance of the sovereign will of the nation, was to avoid a clash at any price between Greece and the Teutonic Powers, even at the cost of dishonoring the country by violating a solemn treaty. Therefore, the new Prime Minister, in obedience to the command of his royal master, informed the Serbian Government after the invasion of its territory by the Bulgarian troops, that Hellas was not bound to draw the sword for the sake of Serbia, because, as Mr. Zaimis argued, the treaty of alliance between the two contracting parties had in view a Balkan and not a European war. Such was the construction given to the provisions of that treaty by the Greek Government then in power.⁵⁷

the "dependence of the King upon the earthly power was exploded," men sought for some theory of political duty and they found it in the conception of Divine right (Volume I, ed. 1911, pp. 37-39). See also Gneist, *Geschichte der Englischen Verfassung*, pp. 545-546. See also valuable information given on this point by Duguit, *Traité de droit Constitutionnel* (Vol. I, pp. 24-28).

On the theory of Divine right generally, see Jellinek, *Allgemeine Staatslehre*, ed. 1914, pp. 670 *et seq.*; also, Bluntschli, *Allgemeine Staatslehre*, ed. 1886, pp. 332-334, remarks (a, b, c, d, e, and f), who asserts that Frederick the Great repudiated this doctrine, and justly observes that "the new world cannot be beguiled with this production of a morbid imagination."

On the exaggerated conception of regal rights of Louis XIV, see F. Laurent, *Histoire du droit des gens*, Vol. XI, pp. 10-13.

E. Glasson tells us that the words "King by the Grace of God," which had at one time disappeared from the English coins, reappeared during the cabinet of Lord John Russell, in order to satisfy "certain trivial scruples" (*Histoire du droit et des constitutions politiques, civiles et juridiques de l'Angleterre*, Vol. V, pp. 407-408).

That these words have no serious meaning now is the view also of Italian writers, who tell us that the King of Italy calls himself "King by the Grace of God, and by the will of the nation." (See L. Palma, *Corso di Diritto Costituzionale*, Vol. II, p. 375; see also C. Brusa, *Staatsrecht des Königreichs Italien* in Marquardsen's *Handbuch des Öffentlichen Rechts*, Vol. IV, pp. 72-76.

⁵⁷ This point will be fully discussed in the second part of this article.

The new Government could not, however, long stand on its feet, and lacking the support in the Boulé of the party of Mr. Venizelos, the Zaimis Cabinet was obliged to resign on November 5, 1915. The King looked around again for another Premier who would follow "his policy," and such a Prime Minister was found in the person of Mr. Skouloudis, who, with the support of Mr. Gounaris, formed a Cabinet. The new Premier, as the events subsequently proved, was reduced to a mere scribe to carry out the royal will whatever that might be. Now the King, upon the advice of his "Ministers," and contrary to all parliamentary usage, again dissolved the Boulé, so as to be unhampered in carrying out "his policy." But Mr. Venizelos and his party, considering this step to be contrary to the Constitution, refused to take part in the elections which took place in December, 1915. The elections being unchallenged, all the candidates put forth by Mr. Gounaris were elected. Consequently the new Cabinet remained in power to carry out the royal will. From that time Greece began to suffer the consequences of the "royal policy."

The history of Hellas, both ancient and modern, does not offer an example in which its public affairs were conducted in such a narrow-minded, stupidly stubborn way, bordering even upon treachery. The guiding spirit of this pernicious policy was no doubt King Constantine who, imagining himself to be a God-sent sovereign, assumed dictatorial powers, threw to the winds the Constitutional Charter which he had pledged under oath to maintain, and destroyed every vestige of the liberal institutions with which the country was endowed. According to all accounts, the "King of the Hellenes" inaugurated on the shores of the Mediterranean a system akin to that in vogue on the shores of the Bosphorus, emulating the notorious ex-Sultan Hamid in his system of spies and parasites, of prosecutions and ruthless treatment of those who opposed his policy.

It was but natural that the ultimate result of this "royal policy" was the humiliation of Greece, the loss of the friendship and esteem of her benefactors and traditional protectors, the contempt of her enemies, financial ruin, and, worse than all her calamities, the loss of honor in not fulfilling her treaty obligations toward her faithful ally, Serbia.

Is it, therefore, any wonder that the modern Cretan Epimenides,⁵⁸ being transformed by Pallas Athena into a full-fledged Hercules, should be preparing to cleanse the new Augean Stables in Greece, or into a modern Theseus⁵⁹ who, after accomplishing the great task set upon him and his associates, expects to return to Athens in order to establish the national union shattered to pieces by the "King of the Hellenes."

THEODORE P. ION.

⁵⁸ A name given to Mr. Venizelos by the present writer in an article entitled "The Cretan Question" in the April, 1910, issue of this JOURNAL, on account of his great services to Greece during the peaceful revolution of 1909, when by his presence in Athens he brought about a speedy settlement of the then burning questions. Epimenides, the Cretan prophet and poet, was brought to Athens by the Legislator Solon to cure the evils then prevailing in the city.

⁵⁹ Theseus, a Greek hero, according to tradition, after performing many heroic deeds, returned to Athens, and there united the various tribes, then at war with each other. In token of this national union, he instituted the famous festivals of Panathenæa.

CONTRIBUTIONS, REQUISITIONS, AND COMPULSORY SERVICE IN OCCUPIED TERRITORY¹

[BEING PART XII OF "SOME QUESTIONS OF INTERNATIONAL LAW IN THE EUROPEAN
WAR," CONTINUED FROM PREVIOUS NUMBERS OF THE JOURNAL]

IN all the wars of the past century in which Germany was a party, her policy in respect to the exaction of pecuniary contributions, the imposition of fines on communities, and the requisition of supplies and services from the inhabitants of occupied territory has been especially rigorous and in accord with the extreme views which her military writers and publicists have always held in regard to the rights of a military occupant. Bluntschli charged the Prussians with having levied without sufficient reason excessive contributions during the War of 1866 on various towns and cities which took sides with Austria, and he adds that such methods of warfare were not civilized, and Europe no longer recognizes them as such.² The town of Frankfort was assessed 12,000,000 marks, and after this sum had been handed over, 40,000,000 more was demanded but was subsequently remitted by the King of Prussia, to whom the town sent a deputation praying to be relieved of this enormous imposition.³ Rations of the value of about 40,000,000 marks were also exacted from the town.⁴ Other towns were subjected to similar requisitions.

During the Franco-German War of 1870-71, the Germans, as is well known, not only resorted to the power of requisition on a huge and unprecedented scale, but in addition levied heavy contributions on many towns and districts which they occupied, as well as imposed exorbitant fines on communes in which *francs tireurs* operated and

¹ German policy in respect to fines and other collective penalties will be considered in another paper.

² *Droit International Codifié* (French trans. by Lardy), sec. 654.

³ Spaight, *War Rights on Land*, p. 393.

⁴ Hozier, *Seven Weeks War*, p. 80.

even on the communes from which they originally came. Heavy fines were also imposed on communes in which railway lines were damaged by individuals or in which other acts were committed against the German military authority.⁵ Thus the Department of the Lower Seine was assessed 24,000,000 francs, and Rouen was required to raise 6,500,000 francs in five days. The petty town of Haguenau was taxed 1,000,000 francs; Mons was compelled to pay 4,000,000 francs; Paris was taxed 200,000,000 francs, and after the signing of the armistice the Departments of the Seine-et-Oise and Oise were compelled to raise 10,000,000 francs.⁶ In December, 1870, a per capita assessment of 25 francs per head was levied on the inhabitants of all the occupied districts in France for the avowed purpose of breaking the resistance of the population and of exerting pressure upon the people to turn them against Gambetta and bring about the election of an assembly in favor of ending the war.⁷ This expedient, says Loening, "was extraordinary, but the situation was none the less so."⁸

In nearly all the cities occupied, says Calvo, the inhabitants were compelled to raise within short periods of time enormous sums exceeding many times the resources of the municipal treasuries, and necessitating recourse to forced loans or appeals to the generosity of the inhabitants.⁹ The Minister of the Interior in an official report to the National Assembly in 1871 estimated that in the thirty-four departments invaded, the contributions of war levied by the German authorities amounted to 39,000,000 francs, the taxes collected aggregated 49,000,000 and the supplies requisitioned totaled 327,000,000.¹⁰

⁵ Spaight, p. 122; Bonfils, *Droit Int. Public*, sec. 1219; Calvo, *Droit Int. Pub.*, sec. 2236; Mérignhac, *Lois et Coutumes*, sec. 106; Nys, *Droit Int.*, Vol. III, p. 429; Despagnet, *Droit Int. Pub.*, sec. 589; Bluntschli, *op. cit.*, sec. 643 bis; Latifi, *Effects of War on Property*, p. 34; Andler, *Les usages de la Guerre et la Doctrine de l'Etat-Major Allemand* p. 25.

⁶ Bonfils, sec. 1226, n. 3; Calvo, Vol. IV, p. 266; Latifi, p. 34; Rouard de Card, *Droit Int.*, *La Guerre cont. et la propriété*, p. 178; and Depambour, *Effets de l'occupation en Temps de Guerre*, p. 77.

⁷ Bonfils, sec. 1222.

⁸ *Rev. de Droit Int.*, Vol. V, p. 108.

⁹ *Op. cit.*, Vol. IV, sec. 2254.

¹⁰ Despagnet, *Droit Int. Public*, sec. 588. See also Bonfils, sec. 1226, n. 3;

Many of the contributions thus levied did not differ from pillage except in name.¹¹ While a few German writers, like Bluntschli,¹² Geffcken,¹³ and Wehberg,¹⁴ think the German authorities went too far, the vast majority of them have defended the German practice, even when it was resorted to avowedly for the purpose of breaking the resistance of the French and of compelling them to sue for peace.¹⁵

The German General Staff in the *Kriegsbrauch im Landkriege* asserts that the power of requisition was resorted to by the Germans during the Franco-German War "with the utmost tenderness for the inhabitants, even if in isolated cases excesses occurred." It justifies the excessive severity in respect to the imposition of fines on the ground of the "embittered character which the war took on in its latest stage and the lively participation of the population which necessitated the sternest measures." The charge in respect to the levying of excessive contributions is disposed of by the remark that "the total of all the money contributions raised in the War of 1870 may be called a minimum compared with the sums which Napoleon was accustomed to draw from the territories occupied by him."¹⁶ It seems difficult, however, to reconcile the harsh and sweeping system of exploitation which the German military authorities adopted in France with the admission of the General Staff that "the arbitrary enrich-

Pont, *Les Réquisitions militaires*, p. 94; Klüber, p. 359; and Rouard de Card, p. 180. Excellent reviews of the law and practice in respect to requisitions and contributions may be found in two articles by Ernest Nys in the *Revue de Droit Int. et de Lég. Comparée*, Vol. 38 (1906), pp. 274 ff. and 406 ff.; and in an article by C. N. Gregory in the *Columbia Law Review* for March, 1915, pp. 1-21; see also Bordwell, *Law of War*, see index; Halleck, *Int. Law*, Vol. II, see index; Calvo, *Droit Int.*, Vol. IV, secs. 2235 ff.; Spaight, pp. 395 ff.; Thomas, *Réquisitions militaires*.

¹¹ Compare Latifi, *Effects of War on Private Property*, p. 34, and Bluntschli, *op. cit.*, sec. 654.

¹² *Op. cit.*, sec. 654.

¹³ Edition of Heffter, p. 30, n. 4.

¹⁴ *Capture in War* (English trans. by Robertson), Ch. IV.

¹⁵ See for example two articles by Loening entitled *L'Administration du Gouverneur-Général de l'Alsace durant la Guerre de 1870-71* in the *Revue de Droit Int.*, 1872-73 (Vols. IV-V), pp. 692 ff. and 69 ff. A German publication entitled *Zum Gebrauch im Feindsland*, published at Berlin in 1906, contains a variety of formularies for the use of military commanders in levying contributions and imposing fines.

¹⁶ Morgan, *The War Book of the German General Staff*, pp. 177-178.

ment of the conqueror is not permitted by modern opinion" and that "a conqueror is not justified in recouping himself for the cost of the war by inroads upon the property of private individuals, even though the war was forced upon him."¹⁷

After this brief review of German policy during the wars of 1866 and 1870-71, we may turn to an examination of German practice during the present war. As has been said, German writers have attempted to justify the exercise on an extensive scale of the belligerent right of requisition and the right to exact contributions during the War of 1870-71, partly on the ground that the war was forced on Germany and consequently it was legitimate to resort to pecuniary levies to make those who had brought on the war bear a portion of the cost, and also to break their spirit of resistance and to induce them to sue for peace.

In the present war, however, no such excuse can be pleaded, because Germany was herself the aggressor against Belgium. Moreover, the impoverished condition to which Belgium was reduced in consequence of the German invasion made the imposition of heavy pecuniary exactions a peculiar hardship for those who were compelled to raise the large sums demanded. But this extenuating circumstance does not appear to have been taken into consideration, and no sooner had the German military forces established themselves in Belgium than they proceeded to levy pecuniary impositions of various kinds on the towns, cities and districts which fell under their occupation, to say nothing of the enormous community fines, which it is not my purpose to consider at this time.

The following list of "war contributions" is reported to have been levied upon Belgian and French towns and districts during the first month of the war: Brussels, 200,000,000 francs; Liège (Province and city), 50,000,000; Louvain, 100,000; Brabant (Province), 450,000,000; Lille, 7,000,000; Amiens, 1,000,000; Roubaix and Tourcoing, 1,000,000; Lens, 700,000; Armentieres, 500,000; total, 710,300,000 francs.¹⁸ It

¹⁷ *Ibid.*, p. 177.

¹⁸ *London Times*, Sept. 8, 1914. An Amsterdam dispatch of Nov. 2, 1914, stated that the Brussels "war indemnity" had been fixed at 45,000,000 francs. It is stated in the Fifth Report of the Belgian Commission of Inquiry that the con-

is not clear from the press dispatches what was the exact nature of these impositions. In some cases they may have been fines for individual offenses against the orders of the occupying belligerent, but apparently they fall within the category of "contributions" as the term is used in the treatises on international law. Other similar exactions followed in quick succession. In October, after the fall of Antwerp, a contribution of 40,000,000 francs was levied on that city. Namur and the seventeen neighboring communes were subjected to a "war contribution" of 50,000,000 francs, which was afterwards reduced to 32,000,000, on condition that the first million should be paid within 24 hours.¹⁹

By an order of December 10, 1914, issued by General von Bissing, Governor-General of Belgium, a war contribution of 480,000,000 francs was levied upon the nine occupied provinces of Belgium, the same to be paid in twelve monthly instalments of 40,000,000 on the tenth of each month.²⁰ It appears that the amount of the monthly contribution was first fixed at 35,000,000, but the Belgian authorities agreed that it should be raised to 40,000,000 in return for the promise of the German authorities to pay cash for the supplies requisitioned by them, and for assurances that the assessment would be limited to twelve months and that no additional general contribution would be exacted. This appears from an *avis* published by General von Bissing on January 9, 1915,²¹ which declared that

Subject to the conditions that the contributions imposed on the nine provinces for the duration of a year, amounting to 40,000,000 tribution levied on Louvain was reduced to 30,000 francs. Massart (Belgians under the German Eagle, p. 156) states that the contribution levied on the city of Liège was 20,000,000 francs and that on Brussels was 45,000,000. According to Massart the levy of 450,000,000 on the province of Brabant was so utterly exorbitant that the Germans were induced to cancel it. It is not unlikely that the reports in the *London Times* are exaggerated in some instances.

¹⁹ The Martyrdom of Belgium: Testimony of an Eye Witness, p. 7. Massart, *op. cit.*, p. 156, says the contribution imposed on Antwerp was 40,000,000 francs. Some reports place the amount as high as 500,000,000.

²⁰ Text in *Arrêts et Proclamations de Guerre Allemandes* (Allen and Unwin, London, 1915), p. 49; also in Huberich and Speyer, *German Legislation in Belgium*, 2nd ser., p. 11; and Clunet, 1915, p. 48.

²¹ *Arrêts et Proclamations*, pp. 73-74.

francs per month, are punctually paid, the following stipulations are ordered by the military authority:

1. No additional contributions shall be imposed on the state, the provinces or the communes, other than those which constitute fines made necessary by reprehensible acts against the German army or the German administration.

2. For the stationary troops and fighting armies, requisitions, that is to say, obligatory prestations for their care and maintenance, shall be paid for as soon as possible. Payments for articles sold shall be made on the production of requisition receipts duly verified and as soon as possible after the fact of the payment of the next monthly contribution has been established.

3. That indemnities for requisitioned merchandise or merchandise to be requisitioned *en bloc* shall be paid as soon as possible in currency, in commercial bills of exchange or in credits on German banks.

With this understanding, the installments were promptly paid each month through the agency of an association of banks, each of which contributed a certain portion of the total. The Belgians contend, however, that the stipulations were violated by the Germans by renewing in November, 1915, for an indefinite term, the monthly contribution of 40,000,000 francs, which had been limited to one year, and by refusing to make prompt payments for goods and services requisitioned. The Belgian Government protested against the renewal of the levy, not only as a violation of an agreement entered into by the Belgian authorities and the Governor-General, but also on the ground that it was excessive, the sum being twenty times the amount of the taxes levied by the nine provinces in time of peace.^{21a}

Estimating the total population remaining in Belgium at 6,000,000, this contribution amounted to a per capita exaction of 80 francs, without taking into account the various local contributions and fines imposed on particular localities. As the total budget of the state in peace times varied between 600,000,000 and 800,000,000 francs per year, it will be seen that the general contribution imposed by Von Bissing amounted to between two-thirds and three-fourths of the customary taxes levied for state purposes. The special contri-

^{21a} In November, 1916, a general levy of 10,000,000 francs per month in addition to the above 40,000,000 monthly imposition was made by the German authorities. The purpose alleged was "to pay the cost of the maintenance of the German army of occupation and the German administration of the occupied territory."

bution of 50,000,000 levied on the city of Liège in September, 1914, amounted to about 60 francs per capita, which, added to the 80 francs of the general contribution, aggregated 140 francs. Under the existing conditions this amount certainly seems excessive.

Article 49 of the Hague Convention of 1907 respecting the Laws and Customs of War on Land provides that if an occupant levies in addition to the regular taxes "other money contributions . . . this shall be only for the needs of the army or of the administration of the territory in question." The phrase "needs of the army" is unfortunately very elastic²² and might be interpreted to cover almost unlimited exactions, but it was clearly not the intention of the Hague Conference to authorize military commanders to exact contributions for the enrichment of the occupying belligerent, for the purpose of covering the expenses of the war, or to impose fines under the disguise of contributions.

Bluntschli justly remarks that international law forbids a military occupant from exacting any other contributions than those which are absolutely indispensable for the maintenance and needs of the army.²³ Spaight holds a similar view, and he adds that even under the restrictions imposed by international law they strike one as being peculiarly unjust and are in fact a relic of the theory that an invader has a vested right to the private property of those who fall within his power.²⁴ Loening and other German writers hold that it is legitimate for a military occupant to exact money contributions for the purpose of forcing an enemy to submit,²⁵ and Lammasch defended this proposition at The Hague in 1899, but it found no favor.

There was formerly a small group of writers who maintained that contributions were to be regarded as ransoms or exactions in lieu of pillage, which a conqueror is content to accept as a payment

²² At the Second Hague Conference an effort was made to substitute for the vague term "needs of the army" a more precise one (*e.g.*, "absolute necessity"), but the proposal was rejected through fear of compromising the success of the convention. Several delegates, notably Lansberge, Odier, and Karnebeek, advocated the abolition of contributions, but this proposal was defeated. *Actes et Documents*, III, p. 134.

²³ *Op. cit.*, sec. 654.

²⁴ *Op. cit.*, p. 383.

²⁵ *Rev. de Droit Int.*, Vol. V, p. 107.

for his benevolence in sparing the inhabitants from fire and sword.²⁶ This view is now generally rejected, even by German writers.²⁷ Bonfils very aptly remarks that contributions cannot be regarded as legitimate substitutes for pillage, because pillage is now forbidden.²⁸ War today, says Bluntschli, is civilized; the right of pillage no longer exists, still less the right to destroy without necessity; consequently there can be no such thing as paying for immunity from this pretended right.²⁹ The older view, says Wehberg, a distinguished and enlightened German authority, is contrary to the modern usages of war. "As all destruction of enemy private property," he observes, "contributes to weaken one's opponent, the utmost possible devastation of his country would be the best means of quickly achieving victory. Such a course, however, can no longer be regarded as permissible. Lammasch," he adds, "is on the wrong track, for plundering is expressly forbidden by the Hague Convention (Art. 27)."³⁰

Likewise the theory held by some writers, such as Masse and Bedari, that the power of a belligerent to levy contributions on the inhabitants may be used as a means of indemnifying himself for the expense of the war, is no longer admitted. Such a contention, as Calvo remarks, is in flagrant contradiction with the principle that war is a contest between states and not peoples. A belligerent, therefore, has no more right to compel the inhabitants to supply him with money for carrying on the war than he has to compel them to enlist in his armies.³¹ The old maxim that "war must support war" (*la guerre nourrit la guerre*) is repudiated by the Hague Conventions and by practically all the text writers.³² Warning his readers

²⁶ Among those who held this view were Vattel, Bk. III, Ch. 19; Martens, *Précis*, Vol. II, sec. 280; Klüber, sec. 251. See Rouard de Card, p. 174.

²⁷ For example, by Lueder in Holtzendorff's *Handbuch*, p. 503; Wehberg, *Capture in War*, p. 40; Meurer, *Die Haager Friedenskonferenz*, Vol. II, p. 286; and *Die völkerrechtliche Stellung der vom Feind besetzten Gebiete* (1915), p. 70; Strupp, *Das internationale Landkriegsrecht*, p. 107; and Zorn, *Das Kriegsrecht zu Land*, pp. 307-308.

²⁸ Sec. 1220. See also Verger's Notes on Martens' *Précis*, 249-254.

²⁹ *Op. cit.*, sec. 654.

³⁰ *Capture in War*, p. 42. Cf. also Strupp, *op. cit.*, p. 107.

³¹ *Droit Int. Pub.*, Vol. IV, sec. 2231.

³² Compare Pont, *Les Réquisitions militaires*, p. 98.

against this maxim, Wehberg points out that it could apply even under the most liberal interpretation only to property belonging to the enemy state and not to private property. Contributions of any sort, he remarks, to cover the expenses of the war or to enrich one's treasury are not allowable. They are limited to the urgent needs of the army and the administration of the territory occupied, and the power to exact them must be strictly interpreted.³³ Leuder, to quote one more highly respected German authority, takes the same view. War, he says, is waged against states, not against individuals; and a belligerent has no right to exact contributions as booty or plunder or to assess the cost of carrying on the war upon the conquered population, or for the purpose of compelling the enemy to sue for peace.³⁴

A few German writers, like Loening, however, still maintain, as stated above, that the power to levy contributions may be employed for the purpose of breaking the spirit of resistance of the enemy, and thus compelling him to submit;³⁵ and this seems to be the view laid down in the *Kriegsbrauch im Landkriege*, where it is said that "experience has shown that pecuniary exactions produce the greatest effect on the civil population."³⁶ This theory Bonfils characterizes as "pure sophistry." If, he says, it is permissible to bring pressure on the inhabitants to sue for peace by imposing money exactions on them, why not admit the right of pillage, incendiarism, murder, robbery, etc.? It is impossible, he concludes, to justify the claim to levy pecuniary contributions, since the effect is only to replenish the treasury of the enemy and incite the cupidity of military commanders.³⁷ The view expressed in the German manual forms a striking contrast to that of the French manual, where it is declared that contributions of war, properly speaking, cannot be

³³ *Op. cit.*, p. 41. Compare also Bentwich, *War and the Private Citizen*, p. 62, Verger's *Criticism of Martens' View*, *Précis*, Vol. II, sec. 279, and Nys in the *Rev. de Droit Int.*, Vol. 38, p. 429.

³⁴ Holtzendorff's *Handbuch des Völkerrechts*, Vol. IV, p. 503.

³⁵ See his article cited above in the *Revue de Droit Int.*, Vol. V.

³⁶ Morgan, *The War Book of the German General Staff*, p. 178.

³⁷ *Op. cit.*, secs. 1222-1223. Mérignhac (sec. 166) appears to hold a similar view.

imposed for the purpose of enriching a belligerent or for weakening his adversary. In general, it says, no money contributions may be imposed unless the inhabitants refuse to furnish supplies in kind.³⁸

What appears to have been an innovation in the practice of levying pecuniary exactions on the people of an occupied territory was the imposition by the Germans in certain instances of special contributions on particular individuals of wealth.³⁹ Such a procedure would seem to be nothing more than a form of confiscation in violation of the principle of immunity of private property from capture, and there is no sanction for it either in the laws of war or in the practice of the past. The regulations of the Hague Convention, as well as the discussions of the subject by the text writers, assume that communities and not individuals may be made the subject of contributions. The French Manual of the Laws of War expressly states that contributions may be imposed on communities and districts and not on individuals, and this has always been the view held and acted upon in practice.⁴⁰

In addition to the general and special contributions exacted by the Germans, they, of course, continued to collect the regular taxes, not only from the inhabitants who remained in the territory occupied, but an attempt was even made to collect them from those who had left the country and gone into exile. By an order issued by Governor-General von Bissing, dated January 16, 1915, it was declared that all Belgians who were subject to the regular personal tax for the year 1914 and who since the outbreak of the war had voluntarily left the country and had remained abroad for more than two months and who should not return before the first of March, 1915, should be subject to an additional tax equal in amount to ten

³⁸ *Manuel de Lois de la Guerre Continentale*, 4th ed., 1913, Art. 107.

³⁹ Sarolea in his "How Belgium Saved Europe," p. 140, referring to this practice by the Germans in 1914-15, mentions the imposition of a contribution of 1,000,000 francs on Baron Lambert de Rothschild, and a contribution of 30,000,000 francs on M. Solvay, the well-known Belgian manufacturer. This charge seems to be admitted by Meurer, *Die völker-rechtliche Stellung der vom Feind besetzten Gebiete* (1915), p. 71, who remarks that "in practice, contributions have heretofore been laid on cities and districts, but according to newspaper accounts heavy contributions have been laid on an individual firm by the Germans in Belgium."

⁴⁰ *Manuel de Lois de la Guerre Continentale* (1913), Art. 108.

times the usual personal tax.⁴¹ The said tax was declared to be due not later than April 15th, and would be recoverable by execution on the property of those liable thereto.

This attempt to punish those who had fled from Belgium and to compel them to return was regarded as peculiarly harsh and severe, and the Belgian Government addressed a protest to the Governments of Belgium's Allies and to those of neutral states against the order as "a breach not only of the Hague Convention respecting the Laws and Customs of War, but a flagrant breach of a solemn promise." To an impartial mind, General von Bissing's order can only appear as an unnecessarily severe measure and without justification. It was not reprehensible under the circumstances that large numbers of the Belgian population should have preferred to go into exile to escape what appeared to them as a regime of intolerable severity, and it was clearly their right to do so without being exposed to punishment by confiscation of the property which they left behind.

The information available regarding the nature and amount of supplies requisitioned by the Germans in the occupied territories is, of course, less definite than that concerning contributions, since orders of requisition are not issued with the same formalities as those by which contributions are levied, and are not found in the published collections of military orders and proclamations which is our chief source of information concerning the imposition of contributions. There is, however, sufficient information to warrant the statement that during the present war the Germans have followed their traditional practice in the occupied districts of Belgium and France. Soon after the entrance of the German armies into Belgium, the military authorities took steps to ascertain the location and the amount of the available Belgian stock of various articles which they were likely to need, and to prohibit their exportation from the country. Thus, by successive orders the owners or managers of manufacturing establishments, refineries, depots, warehouses, etc., were required to

⁴¹ Text in *Arrêts et Proclamations de Guerre Allemandes*, p. 79; also in Huberich and Speyer, *German Legislation in Belgium*, 2nd ser., p. 41. For a Belgian view of the harshness of this measure, see Massart, *Belgians under the German Eagle*, p. 299.

furnish the military authorities, under penalty of confiscation, with detailed inventories of their stocks of lead, copper, aluminum, bronze, zinc, grain, flour, vegetables, potatoes, benzine, petroleum, glycerine, rubber, sugar, molasses, syrup, and various other articles. As stated above, embargoes on the export of such supplies were then proclaimed.⁴² By an order of September 30, 1914, the exportation of Belgian horses, hogs, sheep, and alimentary products of every character was also prohibited (except to Germany) under penalty of confiscation.⁴³ The evident purpose of these orders was to insure the conservation of the domestic supply of all such articles for the use of the Germans themselves.

The Belgians charge that as soon as the German armies entered Belgium they proceeded to make liberal requisitions upon the inhabitants for supplies of various kinds, although no information, except in a few cases, is available as to the precise amounts taken.⁴⁴ The reports of the Belgian Commission of Inquiry allege that in many places a wholesale policy of pillage and plunder took place;⁴⁵ no records were kept of the supplies taken, no receipts were given, and in many instances no payments were made.

A report published by the Rockefeller Foundation in February, 1915, stated that the Germans had requisitioned grain, foodstuffs, cattle, and horses in all the towns and villages; also stocks of cotton and wool, raw material, and manufactured goods. "The destruction of implements and plants," said the report, "cannot be estimated. In the smallest villages through which the army passed, no less than

⁴² Texts of these orders may be found in Huberich and Speyer, *German Legislation for the Occupied Territories of Belgium*, 1st ser., pp. 27, 28, 96; 2nd ser., pp. 39, 40, 52, 53, 111.

⁴³ *Ibid.*, 1st ser., p. 21.

⁴⁴ Report of the Belgian Commission of Inquiry, p. 25; Sarolea, *How Belgium Saved Europe*, p. 140; Phillipson, *International Law and the Great War*, p. 236; Massart, *op. cit.*, pp. 132, ff; Grondys, *The Germans in Belgium*, p. 29; and Dampierre, *L'Allemagne et le Droit des Gens*, pp. 147 ff.

⁴⁵ The charge of pillage is confirmed in some instances by testimony found in the diaries of captured or dead German soldiers. See Bédier, *German Atrocities from German Evidence*, pp. 21-23, for examples of diaries containing such testimony. See, also, Eric Fisher Wood, *Note Book of an Attache*, p. 189; Owen Johnson, *The Spirit of France*, p. 53. Appendix B of the Bryce Report; and Dampierre, *op. cit.*, pp. 154 ff.

in some of the great towns, as Louvain and Malines, in which fighting took place or which were completely destroyed by fire, all the houses left standing have been pillaged. We noticed in several of these houses that the furniture which it was impossible to carry away was broken to pieces."⁴⁸

M. Castelein, President of the Antwerp Chamber of Commerce, in a report to the Intercommunal Commission, made public in November, 1915, thus described the requisitions made on the inhabitants of that city:

These requisitions reached an enormous figure, embracing the total amount of stocks in our warehouses and stores accumulated there at the time of the occupation of our town by German troops. The requisitioned goods were for the most part removed from the town during the months of November and December by virtue of might which is greater than right, with the minimum of formality, without any regard to the rights of the owners or holders, without any previous agreement as to the price of the sale. The actual figures of the requisitions, of which I have been able to get the details only regarding raw merchandise, this then representing the major part of our imports, have reached and possibly passed 85,000,000 francs.

According to M. Castelein, the approximate value of requisitions on Antwerp prior to March, 1915, was as follows:

	Francs
Grain	18,000,000
Linseed	2,450,000
Oil cakes	5,000,000
Nitrates	4,000,000
Animal and vegetable oils	6,000,000
Petrol and mineral oils	3,000,000
Cotton stuffs	1,300,000

⁴⁸ Information concerning the German policy of requisitions in Poland and other territories occupied by the German armies is too indefinite to justify an attempt to describe it here. Sweeping charges have, of course, been made that Poland in particular was the object of a wholesale system of spoliation under the guise of requisitions. Vehicles, farm machinery, grain, potatoes, and other supplies in large quantities are alleged to have been taken not only for the use of the military forces but for transportation to Germany. A dark picture of the situation may be found in the *London Times* of November 25, 1915; see also the *New York Times* of the same date. The extensive system of requisitions in Poland, and especially the carrying away of supplies to Germany, caused the British Government to refuse to permit the sending of food for the relief of the Polish popu-

India rubber	10,000,000
Leather goods imported from abroad	20,000,000
Hair	1,150,000
Ivory	451,000
Wood	500,000
Cocoas	2,000,000
Wines	1,100,000
Rice	2,000,000
Coffee	275,000 ⁴⁷

For most of these supplies, the Belgians charge that no receipts were given. Of the 85,000,000 francs, worth of merchandise thus requisitioned, M. Castelein estimated that not more than 20,000,000 francs had been paid for at the time of his report, but after much complaint and delay the owners had succeeded in obtaining their vouchers.⁴⁸

The rules governing the right of requisition are found in Article 52 of the Hague Convention of 1907 respecting the Laws and Customs of War on Land. They are as follows:

Neither requisitions in kind nor service can be demanded from communes nor inhabitants, except for the needs of the army of occupation.

They shall be in proportion to the resources of the country. . . .

Contributions in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given, and the payment of the amount due shall be made as soon as possible."

These rules, the Belgian Commission of Inquiry alleges, were systematically violated.⁴⁹

lation; this on the ground that it would involve the rendering of assistance to the Germans. The diplomatic correspondence relating to the matter may be found in a British White Paper entitled "Correspondence Respecting the Relief of Allied Territories in the Occupation of the Enemy." Misc. No. 32, 1916, *Cd.* 8348.

⁴⁷ Davignon, Belgium and Germany, p. 123; also 13th Report of the Belgian Commission of Inquiry.

⁴⁸ Specimen forms of requisition orders issued may be found in Davignon, Belgium and Germany.

⁴⁹ Report on the Violations of the Laws of Nations (English trans.), p. xvi. Some German writers still maintain, or did recently, that requisition of supplies or services without payment is lawful. See Leuder in Holtzendorff, Vol. IV, p. 502, and Loening, in the *Rev. de Droit Int.*, Vol. IV, p. 645. It is the duty of the state, says Loening, from which the supplies are taken to indemnify the owners. It is, he says, wholly a question of municipal not of international law. In case the state

The Bryce Report states that requisition receipts given to the peasants for small amounts bore genuine signatures, but that whenever goods of considerable value were taken the receipts were fraudulent.⁵⁰

It has been stated by some writers that during the early days of the invasion the German armies generally paid cash for the supplies which they took, but when it became evident that the Belgians were disposed to resist the invaders, the practice of paying cash was discontinued.⁵¹ Thus, after the imposition of the contribution of 200,-

is victorious, it will exact an indemnity from its adversary sufficient in amount to cover the value of the supplies taken. But Bluntschli (sec. 655) and practically all English and French writers adopt the contrary view. Wehberg (*op. cit.*, p. 47) expresses the opinion that Art. 52 of the Hague Convention respecting payment as soon as possible is of no value because the requisitioning belligerent will never have the means to pay. Usually the defeated belligerent, he says, will have to bear the cost. Cf. Zorn, *op. cit.*, p. 314.

Regarding the rule that requisitions shall be in proportion to the resources of the country, Moltke in his well known letter to Bluntschli of Dec. 11, 1880, observed that "the soldier who endures suffering, privation, fatigue, and danger cannot be content to take only in proportion to the resources of the country. It is necessary for him to take all that is necessary to his subsistence." This was also the view of Von Clausewitz, *Von Kriege*, Vol. II. p. 85, who says "the law of requisitions has no limits except the exhaustion, impoverishment and destruction of the country" of Von Hartmann, *Deutsche Rundschau*, Vol. XIII, pp. 450, 458, who adopts essentially the same view; and it is the view laid down in the *Kriegsbrauch im Landkriege* (Morgan's trans., pp. 175-176). The right of requisition without payment, it says, exists as much as ever, and will certainly be claimed in the future by armies in the field, and considering the size of modern armies, must be claimed. As to the rule that requisitions must be in proportion to the resources of the country, it will never be observed in practice, we are told, for the needs of the army must determine the amount. But Strupp, *op. cit.*, p. 111, condemns this view. The French *Manuel* (Art. 103) adopts the rule of the Hague Convention. Requisitions, it declares, can only be made for the indispensable needs of the army. They must be in proportion to the resources of the country, and this rule the French armies will observe in the enemy's country.

⁵⁰ Evidence and Documents on Alleged German Atrocities, Appendix, p. 288. See, also, the 11th Report of the Belgian Commission of Inquiry.

⁵¹ Chambry, *The Truth about Louvain*, p. 19. On August 4, 1914, the Commander of the Army of the Meuse, in an address to the Belgian people, promised that the Germans would pay in gold for the supplies (*vivres*) which they found it necessary to take and that "our soldiers will show themselves to be the better friends of a people for whom we feel the highest esteem and the greatest sympathy." *Arrêtés et Procs. de Guerre Allemandes*, p. 3.

000,000 francs on Brussels in September, 1914, General von Luettwitz published a proclamation in which it was stated that the German Government had ordered the payment of requisitions under the condition that the city would pay voluntarily and in its entirety the war contribution that had been imposed on it. "It is only under this condition," he added, "that this favored treatment is accorded to Brussels, different from all other cities of Belgium, requisitions upon which will be paid for only after the conclusion of peace. If it is established that the communal administration of Brussels refused to pay the remainder of the said war contribution, no requisition receipt will be paid from this date by the government treasury."⁵²

At the time of the imposition of the general contribution of 40,000,000 francs per month on the inhabitants of the nine occupied provinces of Belgium (Dec. 14, 1914), the German authorities promised that they would pay cash for all supplies subsequently requisitioned, provided the monthly installments of the contribution were punctually met. M. Castelein, in his report of November, 1915, charged, however, that the Germans were then in arrears to the amount of about 65,000,000 francs on account of their requisitions at Antwerp. By an order of January 15, 1915, Governor von Bissing announced that from January 15th there would not, *as a general rule*, be any requisitions made without cash payments. In exceptional cases, however, where it was not possible to pay cash for supplies which were indispensable to the army, a receipt would be given. But this rule would not apply to the mass of merchandise which had been retained by the military administration at Antwerp and some other places.⁵³

As stated above, the Belgians also charge that the Hague rule which limits the amount of supplies that may be requisitioned to the "needs of the army" and requires that they shall be "in proportion to the resources of the country" was violated in many instances.⁵⁴

A form of German requisition policy which was the subject of

⁵² Text in *Arrêts et Procs.*, p. 14.

⁵³ *Arrêts et Proclamations*, p. 77.

⁵⁴ Thus at Ostend the German soldiers, it is alleged, requisitioned all the food and drink, leaving the inhabitants without the necessary means of subsistence, in consequence of which they would have been reduced to starvation had not outside relief been provided. *London Times*, Nov. 24, 1914.

strong complaint was the seizure and transportation to Germany on a somewhat extensive scale of live stock, particularly horses and cattle, from the occupied districts. As is well known, the breeding of draft horses was one of the leading industries of Belgium, and upon the Belgian supply a large part of continental Europe was dependent. The annual value of the exportations to Germany alone was estimated at 24,000,000 francs.⁵⁶ Soon after the occupation of Belgium, the Governor-general issued an order forbidding the exportation of horses from the occupied districts, but an exception was made in the case of exportations to Germany. Then followed, so the Belgians allege, a wholesale policy of requisition, especially of stallions and brood mares, not for the needs of the army, but for transportation to Germany for the use of German farmers and stock raisers. During the month of August and the early part of September, 1914, says the Belgian Commission of Inquiry, the German troops seized "an enormous number" of horses. In the "immense majority of cases" no payments were made, although in certain cases receipts bearing no genuine signatures, no description or price of the animals taken, or which were otherwise irregular, were given. When the price was fixed it was inferior to the real value. Taking advantage of the Belgian ignorance of the German language, the soldiers occasionally gave bogus papers. It is also charged that many horses were wantonly killed.⁵⁶

Many horses were confiscated, it is alleged, for the failure of their owners to bring them in for sale in compliance with notices posted throughout occupied districts by a commission sent by the German Minister of Agriculture.⁵⁷ The horses thus seized were transported

⁵⁶ 13th Report of the Belgian Commission of Inquiry.

⁵⁶ *Ibid.*

⁵⁷ See the text of specimen notices of this character, in the Belgian Report on the Violations of the Law of Nations, p. 12, and in Davignon, *Belgium and Germany*, p. 119. They are alleged to have been placarded at Lessines, October 5, 1914; at Binche, October 9th; at Lens, October 13th; at Chievres, October 16th; at Gembleux, October 27th; at Tulliers, November 9th; and at Nivelles, November 27, 1914.

Mr. Geo. B. McClellan, who traveled through Belgium in 1915 and who defends the Germans against many of the acts with which they have been charged, states that there was "apparently no lack of cattle, sheep, and poultry" in the country,

to Germany, where they were sold at public auction by the Minister of Agriculture, by chambers of commerce, or by designated individuals, official notices being published in the newspapers informing the farmers of the community of the intended sales.⁵³

A large number of cattle, and especially milk cows, was also seized in the occupied districts of both Belgium and France and transported to Germany. Lord Robert Cecil, British Minister of Munitions, on March 19, 1916, referring to the German charge that Great Britain was endeavoring to starve the civil population of Germany by means of an unlawful blockade, stated that in the occupied area of northern France there were at the time of the arrival of the German armies half a million cattle, whereas

Hardly one is left today, and Mr. Hoover's commission is sending into that district 3,000,000 tins of condensed milk monthly to keep alive the thousands of French babies whose source of supply has been taken from them by the Germans. This milk is being paid for by French money. Without this fund and the work of a neutral commission these French babies would be dying of starvation today. Belgium had 1,500,000 cattle; we know that practically half of these have gone to Germany.

If the charges thus made against the Germans are true, it is impossible to justify them either upon grounds of justice or the law of nations. Article 52 of the Hague Convention respecting the Laws and Customs of War, expressly forbids requisitions in kind except "for the needs of the army of occupation," and it further enacts that as far as possible payments shall be made in cash; if not, receipts shall be given and payment shall be made as soon as possible. It was clearly not the intention of the Conference to authorize the taking away by a military occupant of live stock for the maintenance of his own industries at home or for the support of the civil population and that "if the Germans have helped themselves to cattle, as has been charged, they have left a great number untouched." *The Heel of War*, p. 57.

⁵³ The *Deutsche Tages Zeitung* of February 2, 1915, contained an announcement of an offer for sale to the highest bidders of 60 head of horses "directly imported from Belgium." The *Kölnische Zeitung* of October 13, 1914, contained a notice of a "Sale of Belgian horses and mares, Booty of war" (260 horses and 54 mares), "on behalf of the Chamber of Agriculture, with the assistance of the Central Horse Rearing Society of the Rhine."

lation of his own country. By no process of reasoning can such requisitions be construed to be for the "needs of the army of occupation."

A similar charge was that of committing spoiliations upon Belgian manufacturing industry by dismantling factories and workshops and carrying away their equipment of machinery and tools to Germany, this also without payment and without furnishing the owners with receipts. In the district of Charleroi machinery to the value of 12,000,000 francs is alleged to have been taken.⁵⁹ Down to the 21st of January, 1915, the value of machinery thus appropriated and sent to Germany was estimated at more than 16,000,000 francs. On the 22d of January, 1915, the Belgian Federation of Builders addressed a letter to the German Military Governor complaining of the spoliation of Belgian manufacturing establishments and the removal of their machinery to Germany, often without furnishing the owners with receipts or other documents establishing their character, quantity, or value.⁶⁰ The Belgian Government likewise addressed a protest to the governments of neutral countries against these acts as being contrary to Article 53 of the Hague Convention respecting the Laws and Customs of War, which, although it allows, subject to restoration and indemnity for its use, the seizure of war material belonging to private persons, does not authorize the seizure and exportation by an occupying belligerent of machinery and implements used in the industrial arts.⁶¹ The removal and transporta-

⁵⁹ Preface to the Belgian Report on Violations of the Laws of Nations in Belgium, p. xv. It appears that the German authorities entered into a contract with a private firm at Cologne by which the latter undertook to forward by the quickest route to a German factory machinery and tools seized in Belgium and France and to return the same at the close of the war. Davignon, Belgium and Germany, p. 121. Mr. A. B. Farquhar, a well known manufacturer, who, as a member of the American Industrial Commission, traveled through France and Belgium in 1916, reported that the Germans had carried away from the occupied portions of those countries, "all the machinery and everything that would be valuable in the reorganization of factories." *New York Times*, Nov. 16, 1916.

⁶⁰ *Ibid.*, Belgian Report, p. 18; see also Davignon, p. 121; and Massart, pp. 158 ff.

⁶¹ Paragraph 2 of Article 53 reads as follows:

"All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or goods, apart from cases governed

tion to Germany of such machinery, the protest added, "neutralizes the efforts of manufacturers to continue the operation of their factories, condemns large numbers of Belgian workmen to idleness and starvation, and will have the result of retarding the resumption of trade after the war. These illegal requisitions are all the more reprehensible because they affect a people already ruined by the war and deprive them of the means absolutely indispensable to their subsistence." ⁶²

by maritime law, depots of arms, and generally, all kinds of war material, may be seized, even though belonging to private persons, but they must be restored and compensation for them arranged for at the peace."

The authority to requisition, here conferred, is clearly limited to "war materials" and is conditioned upon the obligation to restore the same at the end of the war and to indemnify the owners for their use. It appears, however, to have been the intention of the German authorities to restore at the end of the war the machinery thus seized.

⁶³ "Enormous quantities" of raw materials, cotton, wools, nickel, jute, etc., are alleged to have been removed to Germany for use in German industries. They were, of course, not needed by the army of occupation. Davignon, pp. 113, 116, and Massart, p. 159. Dean Howard McLenahan of Princeton University, who traveled through Belgium and made a special study of conditions there, thus describes in an article in the *New York Sun* the German requisition policy:

"When the Germans had completed their occupation of Belgium, they apparently intended to bring about as far as possible the restoration of normal industrial conditions. There was published in the papers of Cologne a statement to this effect from official sources. Immediately the Labor party denounced this design and threatened political retribution if the attempt were made. Subsequently such a restoration of industry was made impossible by the removal to Germany of the available supplies of raw materials, such as leather, wood, silk, cotton, brass, etc.

"Apparently all idea of such a restoration of industry was then given up, for some time about Jan. 1 a contract was signed between the German officials and a wrecking firm in Cologne for the removal to Germany of all the machine tools, lathes, planers, milling machines, drill presses, etc., in Belgium. This work of removal was actually begun and by Feb. 1 some of the factories of Antwerp had been stripped of their equipment. I do not know whether this practice was continued after that time or not.

"The contention that if the Belgians would they could start up their factories and run them in the normal way is grotesquely absurd on its face. There is little if any raw material in the country, for the Germans have taken away whatever there was at the outbreak of war. There is no opportunity to renew the stock because of the highly successful British blockade. The Germans control the railroads, telegraph and telephone systems and the postal service and make any communication of any sort exceedingly difficult. And the Germans place heavy restrictions upon the resumption of work at the factories which are in actual part time operation."

What was said above in regard to the illegality of the requisition of live stock and their transportation to Germany for the benefit of German industry and for the support of the civil population at home, must be said of the seizure and transportation for similar purposes of the machinery and equipment of Belgian factories and other manufacturing establishments. The materials thus taken were not for the needs of the army of occupation, and the carrying of them away was nothing more than spoliation under the disguise of requisitions.

The German policy of wholesale requisition of Belgian raw materials and foodstuffs, as well as the carrying away to Germany of live stock, not only had a serious effect upon Belgian industries, but it greatly complicated the problem of relief by neutral agencies. There was some complaint in Belgium that the refusal of Great Britain to allow the importation of raw materials into Belgium prevented the rehabilitation of the industries of the country, the disorganization of which was responsible for much of the unemployment and distress existing therein. The British Government, however, took the view that the importation of raw materials into Belgium would only serve to release the domestic supply for further requisition by the Germans. Nevertheless, it proposed to Germany to allow the importation of raw materials into Belgium and the exportation of goods manufactured from such materials, provided it were done through and under the supervision of the American Relief Commission, and provided also the Germans were willing to engage to abstain from requisitioning any native stocks of similar raw materials or of goods manufactured from such materials. In a memorandum laid before the Belgian Minister at London in January, 1916, Sir Edward Grey stated that, although four months had elapsed since this proposal had been submitted to the German authorities, no reply of any kind had been received. Germany, he said, had deliberately determined not to enter into any agreement until they have taken "the last ounce of native stocks of raw materials or manufactured goods which can be of any use to them, and until they have been able to create such widespread destitution as to force a requisite amount of Belgian labor to emigrate to Germany or to take employment in Belgian works controlled by them for their own purposes."

Sir Edward asserted that in one month alone 74,000 tons of coal had been taken from Belgium to Germany; 6100 tons of phosphates; 100 tons of lead; 1350 tons of ore; 540 tons of pit props; 1200 tons of guano, and 1600 tons of briquettes. In addition, there had been large exports from Belgium to Germany of pyrites, tanning extracts, lead extracts and quantities of iron, rubber, and other raw materials. It was well known, he said, that half the products of the Belgian textile mills had been requisitioned. Should the British Government attempt to provide relief for the industries of Belgium by permitting importations to replace the Belgian stock of raw materials taken away by the Germans, these would be promptly requisitioned. His Majesty's Government must, therefore, disclaim all responsibility to the Belgian people for the ruined condition of their industries; that responsibility must be placed on the Germans, whose fixed policy was to impoverish the country by means of requisitions, contributions, and fines and to drive Belgian workmen to seek employment in Germany.⁶³

The British Government, however, allowed the importation of supplies by the American Relief Commission, and although the Germans refrained from requisitioning these supplies, the British authorities were well aware that the effect was to enable the Germans to requisition more liberally the Belgian domestic stocks without reducing the population to starvation. The British Government also contributed \$500,000 to the funds of the Relief Commission, and this was supplemented by grants from Canada, Australia, and New Zealand; but in February, 1916, Sir Edward Grey notified the chairman of the commission that, in view of the policy of the German Government in respect to requisitions, "the proposed arrangement between His Majesty's Government and the commission must be regarded as having broken down." No further grants for the support of the commission would therefore be made. Sir Edward added, however, that "We shall, of course, maintain our general favorable attitude towards your work, and our offer of financial support will remain open in the event of the German Government

⁶³ The text of this memorandum is printed in the *London Times* (Weekly ed.), February 25, 1916, p. 147.

receding from their present position with regard to their levies in Belgium."

Hardly less justifiable than the carrying away of machinery and raw materials, was the tearing up of the tracks of various Belgian railroads, especially of interurban roads (*les chemins de fer vicinales*) which are owned, not by the state, but by private individuals, and the transportation of the rails to Poland for the construction of military railways. The Belgian Government protested to the governments of neutral Powers against this form of spoliation, not only because it deprived the Belgians of the only means of commercial transportation which remained under their control,⁶⁴ but because it was in violation of the Hague Convention respecting the Laws and Customs of War on Land. Article 53 of the convention, as stated above, authorizes the seizure of "appliances for the transport of persons or things."⁶⁵ even when they belong to private individuals, upon condition that they be restored and compensation made at the conclusion of peace.

Manifestly, this stipulation had reference only to the *use* or exploitation of such "appliances" by the occupying belligerent, and can hardly be construed to authorize the tearing up of railway tracks and their removal to a foreign country, for in such a case the probability of their restoration intact at the end of the war would be very remote. It might be otherwise with rolling stock, which could be easily removed from the territory occupied and returned at the end of the war without necessary injury to the plant. The right of a belligerent to seize and operate railways belonging to the state is conditioned upon the same obligation. Article 55 of the above mentioned convention lays down the rule that the occupying belligerent shall be regarded only as the usufructuary of public property

⁶⁴ The main railway lines, which in Belgium are owned and operated by the state, were taken over and operated by the German military administration, mainly for military purposes.

⁶⁵ The Act of the Brussels Congress of 1874 had expressly enumerated among the "appliances" referred to in Art. 53 of the Hague Convention, "railway plant, land telegraphs, steamers and other ships." The Hague Conference, however, deemed it wise not to enumerate specifically the objects the seizure of which it intended to authorize. But there can be no doubt that railway lines came within the scope of the paragraph quoted.

situated in the territory occupied, and that he must safeguard the substance (*le fond*) of such property and administer it in accordance with the rules of usufruct. It is very doubtful whether the tearing up of a railway track and the transportation of the rails to a distant country under the occupation of the belligerent, to be used by him for the purpose of building new lines, can be regarded as "administration" according to the rules of usufruct.⁶⁶

A somewhat similar complaint made against the Germans was the cutting without discrimination of large numbers of walnut trees from the state and communal forests to be sent to Germany for use in the manufacture of rifle stocks.⁶⁷ There were also extensive cuttings to secure material for trench shelters, for corduroying roads and for fuel for cooking and warming. Some of the forests thus denuded were as ancient as the cathedrals which likewise suffered from the hands of the military occupant. In France, especially in the region of

⁶⁶ "The rules of usufruct," says Holland, *Law of War on Land* (§115), "may be shortly stated to be that the property subject to the right must be so used that its substance sustains no injury." The authorities who have considered the rights of belligerents over railroads in occupied territory, so far as I am aware, have not pronounced an opinion on the question of their right to tear up the tracks and take the rails out of the country for use elsewhere. They are all in agreement, however, in holding that a belligerent has no lawful right to damage or destroy a railway line further than to cut it in order to prevent the enemy from drawing supplies over it or from maintaining communications. They all seem to be agreed, likewise, that the occupying belligerent is bound to restore the road at the end of the war in the same condition in which he found it. This rule was approved by the Institute of International Law in 1883.

See on this point the views of Stein, a professor in the University of Vienna, in an article entitled *Le Droit International des Chemins de Fer en Cas de Guerre*, *Rev. de Droit Int. et de Lég. Comp.*, Vol. XVII, especially p. 350; of Moynier, *ibid.*, Vol. XX, p. 365; of Buzzati, *Les Chemins de Fer en Temps de Guerre*, *ibid.*, Vol. XX, p. 388; and Nowacki, *Die Eisenbahnen im Kriege* (1906), p. 31. Stein, whose views are attacked by Moynier and Buzzati, holds that a belligerent may destroy the tracks in certain cases where military necessity requires it, but even he does not admit that they may be taken up and transported by a belligerent to a distant country for use in the construction of new lines. The *Kriegsbrauch im Landkriege* allows a belligerent the right only to use the railways of an enemy state and these, it says, must be returned at the end of the war. Morgan, *War Book of the German General Staff*, p. 168.

⁶⁷ *Le Telegrafe*, March 22, 1915; 13th Report of the Belgian Commission of Inquiry.

the Argonne, trees in large numbers are alleged to have been cut and transported to Germany for use as timber. A similar charge, it will be remembered, was made by the French against the Germans in 1870.⁶⁸ The right of an occupying belligerent in respect to the lopping of forests is thus stated by Westlake: "In the case of forests, the right of a usufructuary is to cut the trees which regularly come to cutting during his tenancy."⁶⁹ The German *Kriegsbrauch im Landkriege* admits that, although a military occupant is not bound to follow the enemy's mode of administration in respect to state forests, he must not damage the woods by excessive cutting, still less may he cut them down altogether.⁷⁰

Another serious charge against the Germans was that in a number of instances they seized and confiscated the deposits of private banks. Thus on August 12, 1914, the funds of a branch of the National Bank of Belgium at Hasselt, amounting to 2,075,000 francs, were appropriated by order of the military authorities. Likewise at Liège the Germans upon their entrance into the city seized the funds of the local branch of the national bank, amounting to 4,000,000 francs.⁷¹ Two million, nine hundred thousand francs are also alleged to have been taken from other private banks at Liège; 20,000 francs from a bank at Huy, and 975,000 from a bank at Verviers, and "all the cash" in a bank at Brussels. The deposits of the *Banque Générale Belge*, a private institution, at Namur, were likewise confiscated, but on petition of the directors the German authorities agreed to allow the money to be applied towards the contribution of 50,000,000 francs which had been levied on the town.⁷² At Louvain the Germans are

⁶⁸ See the case of the 15,000 oaks cut by the Germans in the French state forests, the unperformed contracts for the sale of which the French Government refused to enforce after the return of peace. See Cobbett's *Leading Cases and Opinions on International Law*, Vol. I, p. 226. See, also, Snow's *Cases*, p. 377; Bordwell, *Law of War*, pp. 96, 329; Spaight, *War Rights on Land*, p. 367; Latifi, *Effects of War on Property*, p. 19; and Hershey, *Essentials of International Public Law*, p. 416, n. 14.

⁶⁹ *International Law*, Pt. II, p. 106.

⁷⁰ Morgan, *The War Book of the German General Staff*, p. 169.

⁷¹ *The Case of Belgium*, pp. 16-17; also the 17th Report of the Belgian Commission of Inquiry. Massart, p. 133, charges that 43,000 francs were seized from the Peoples' Bank at Auveloïs.

⁷² *Martyrdom of Belgium*, p. 7.

alleged to have seized the available cash assets of various private banks.⁷³

In September, 1916, the Belgian government filed a protest with the department of state at Washington against what it described as an enforced loan of 1,000,000,000 francs (\$200,000,000) said to have been imposed by the German military authorities upon the banks of Belgium. According to a statement of the Belgian minister of finance, of September 19, this was accomplished by the compulsory transfer of the funds of the National Bank of Belgium and the *Société Générale de Belgique* to the German Imperial Bank. M. Carlier, director of the National Bank of Belgium was deported to Germany on account of his opposition to the proposed transfer. The German authorities denied that the funds thus transferred were to be used for subscriptions to the fifth German war loan, but the Belgian Government asserted that inasmuch as the transfer took place at the time the German loan was being put through, it was evident that the purpose was to supply the Imperial Bank with a fresh supply of cash with which to swell its subscriptions to the loan. The protest of the Belgian Government denounced the measure as an "outrage against private property and a violation of international laws and conventions."⁷⁴

It was also reported that a Belgian company owning coal mines in the Far East was compelled to subscribe the surplus profits of the company to the German war loan, and that the assets of all Belgian stock companies had been sequestered.

Regarding the right of a military occupant to seize the funds of banks, Article 53 of the Hague Convention respecting the Laws and Customs of War declares that:

An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property of the state which may be used for operations of war.

Clearly the authority here conferred in respect to the seizure of funds and securities is limited to those belonging to the state, and does not

⁷³ Fifth Belgian Report.

⁷⁴ Dispatches in the *New York Times* and the *London Times*.

include those belonging to municipalities, communes, or private individuals. This is admitted by the German *Kriegsbrauch im Landkriege*.⁷⁵

The National Bank of Belgium, like the national banks of the United States, notwithstanding its name, is a private institution, and its funds are the property of private individuals. Its stockholders are private persons and it is officially designated as a "national bank" only because the state has conferred on it the power to issue notes, in consequence of which its organization is prescribed by the state and, of course, it is subject to government inspection. The seizure of the funds of its branches was, therefore, plainly an act of confiscation of private property, in violation of the express terms of the Hague Convention, and contrary, it appears, to German practice during the Franco-German War of 1870-71.⁷⁶

Charges have also been made against the Germans of having seized and confiscated the funds of the post offices in many of the towns and cities which they occupied. So far as these funds belong to the state, it is, of course, allowable to seize them, but the Belgian post offices are also savings banks, as well as the custodians of old age and other pension funds, which cannot be lawfully seized.⁷⁷ It does not appear, however, that the Germans made any distinction between the funds which belonged to the state and those which were the property of private individuals.

A very serious accusation against the Germans related to the requisition of services and labor of the inhabitants of the occupied territory, the effect of which was to facilitate directly or indirectly the military operations of the enemy. As is well known, the Germans during the War of 1870-71 compelled French civilians to work on

⁷⁵ The public funds referred to in Article 53, it says, "must be entirely distinguished from municipal funds, which are regarded as private property." Morgan, p. 169.

⁷⁶ When the Prussians entered Rheims on Sept. 4, 1870, they desired to seize the funds of the local branch of the *Banque Nationale de France*, but being informed that the bank was a private institution, Crown Prince Frederick decided that they should not be molested so long as they "were not used for the maintenance of the French army." Schiemann, *Rechtslage der öffentlichen Banken im Kriegsfall* (Greifswald, 1902), p. 76.

⁷⁷ See Holland, § 113; and Spaight, p. 411.

roads, dig trenches, remove embankments which the French troops had thrown up to oppose the advance of the enemy, and even to drive carts laden with shells and ammunition.⁷⁸ During the present war they appear to have pursued the same policy on a larger and even more rigorous scale. The Reports of the Belgian Commission of Inquiry charge that at Liège, Aerschot, Namur, Grimbergen, Eppeghem, Hérent, and other places, the inhabitants were compelled to dig trenches for the Germans sometimes when they were even exposed to the fire of the enemy; that the inhabitants of Biermont and Aerschot were forced to erect defensive works; and that at Liège, Namur and other places they were compelled to work on the German fortifications.⁷⁹ Cardinal Mercier charges that during the regime of Governor-General von der Goltz the inhabitants of Belgium were required to perform services of every kind for the Germans: digging

⁷⁸ Sutherland Edwards, *The Germans in France*, p. 295, quoted by Spaight, pp. 150-151; Nys, *Réquisitions et Contributions*, *Rev. de Droit Int.*, Vol. 38, p. 415.

When in January, 1871, a German commander in the Department of the Meurthe requisitioned the services of 500 French laborers and they refused to comply with his demand, he ordered all public works in the department to be closed and prohibited all work in factories, on roads, streets, railway lines, and other public utilities. Likewise all private *ateliers* employing more than 10 laborers and every private factory were ordered to be closed. All contractors on public works and all owners of factories ordered to be closed were forbidden to pay their employees. Violation of the order was punishable by a fine of from 10,000 to 50,000 francs for each day and for each payment. The order was to remain in force until 350 laborers responded to the call of the commander. See text of the order in the *Rev. de Droit Int.*, Vol. III (1871), p. 315. At Nancy on Jan. 23, 1871, at 4 P.M., the same military commander addressed a communication to the mayor demanding the services of 500 laborers and warning him that if they failed to appear by noon of the following day the overseers and a certain number of laborers would be seized and shot. Text, *ibid.*, p. 315.

⁷⁹ Violations of the Laws of Nations in Belgium, pp. 53-55. Professor Leon van der Essen, of the University of Louvain, publishes a letter from one of his colleagues in which the latter states that he, with other inhabitants of Louvain, were compelled to dig trenches for the Germans, and that some of them indeed were required to dig their own graves, after which they were shot. See his brochure entitled, "A Statement about the Destruction of Louvain," pp. 17-18. The French Official Commission of Inquiry (p. 27) published the affidavit of a witness that 100 inhabitants of Creil and Noget were compelled to cut down a field of grain which hindered the firing of the enemy and to dig trenches intended to shelter the Germans.

trenches, working on fortifications, hauling, building and repairing roads, bridges, and buildings, and even to work in the arsenals.⁸⁰

Persistent attempts were made by means of threats, confinement, and other forms of systematic intimidation, of both individuals and towns, to force the Belgian railway employees to work for the enemy. For refusing to do so, they were, in some cases, subjected to imprisonment or deportation.⁸¹

The refusal of the Belgian railway employees to work for the Germans was based on the ground that the effect would be to liberate the services of an equivalent number of Germans who after the desertion of the Belgian employees had been compelled to take their places in order to keep the railway lines in operation. Moreover, their labor would facilitate the transportation of German troops and military supplies to which, naturally, no patriotic Belgian desired to contribute. Neither the distress which they suffered from unemployment nor the promise of high wages were sufficient inducements to bring about a resumption of their labors. For this refusal, says the Belgian Commission of Inquiry, the people were subjected to the "most odious persecution throughout all Belgium."⁸²

Persuasion and promise of fancy wages having failed, orders were issued by the German authorities from time to time with a view to compelling the inhabitants by force to work. Among these was the order of October 4, 1915, "concerning measures intended to assure the carrying out of works of public usefulness"; that of August 15, 1915 "concerning the unemployed, who through idleness refrain from

⁸⁰ Letter to the Bishops of Germany and Austria-Hungary published in a brochure entitled "Appeal to Truth." Massart, *Belgians under the German Eagle*, p. 113, cites various instances in which Belgians were compelled to dig trenches for the Germans, prepare ground for the landing of aeroplanes, build huts, employ their own horses and wagons in the hauling of munitions and the like. A Dutch Newspaper Correspondent, writing in *Les Nouvelles* of Maastricht in December 1916, stated that a thousand Belgians were at that time being compelled to perform military work on the Somme front and that four thousand others were about to be sent there. *New York Times*, Dec. 21, 1916.

⁸¹ Report of the Belgian Minister of Railways, Posts, Telegraphs, and Marine regarding the affair at Luttre; French edition of the Belgian Report on Violations of the Laws of Nations in Belgium, pp. 77, 81-84.

⁸² Texts in "Appeal to Truth," an address of Cardinal Mercier and the Bishops of Belgium to the Bishops of Germany and Austria-Hungary, p. 29.

work"; and that of October 12, 1915, article first of which declared that

Whoever without reason refuses to undertake or continue work suitable to his occupation and in the execution of which the military administration is interested and which has been ordered by one or more of the military commanders, will be liable to imprisonment not exceeding one year and he may also be deported to Germany. Invoking Belgian laws or even *international conventions* to the contrary can in no case justify a refusal to work.

Article 2, of the same order declared that

Any person who by force, threats, persuasion or other means attempts to influence another to refuse work as pointed out in Article 1, is liable to the punishment of imprisonment not exceeding five years.

Article 3 declared that

Whoever knowingly by means of aid given or in any other way abets a punishable refusal to work, shall be liable to a maximum fine of 10,000 marks, and, in addition, may be condemned to a year's imprisonment.²³

On November 19, 1914, Von der Goltz issued an order intended especially to put a stop to the activities of those patriots who were endeavoring to prevent by persuasion or intimidation kindly disposed Belgians from working for the Germans.

This order reads as follows:

Whosoever attempts to prevent by force, threat, persuasion, or other means, any persons disposed to carry out any work for purposes required by the German authorities from so carrying out this work, or obstructs any contractors entrusted by such authorities with the execution of this work, shall be punished with imprisonment.

Lieutenant-general Von Westarp undertook to hold the community responsible for the refusal of the inhabitants to comply with his demand for laborers. On June 10, 1915, he posted the following notice at Ghent:

By order of his Excellency, the Inspector of Stores, I bring the following to the attention of the commune: the attitude of some factories (*Fabriken*) which, under the pretext of patriotism and relying on the Hague Convention, have refused to work for the German

²³ 18th Belgian Report (French ed.), p. 76.

military administration, proves that among the population there are efforts (*Bestrebungen*) the effect of which is to raise difficulties for the military administration. In consequence, I make known that I will repress by every means at my disposal such machinations (*Umtriebe*) which can only trouble the good relations until now existing between the military administration and the people. I will hold responsible in the first place the communal authorities for the spread of such machinations and the wide liberties heretofore allowed the people will be withdrawn and replaced by restrictive measures made necessary by their own acts.⁸⁴

Unsuccessful attempts were made at Luttre and Malines to compel the resumption of work by arsenal employees, who had left their positions because they were unwilling to engage in the manufacture of arms and munitions to be used against their countrymen. Promises of high wages failing to induce the men to return to work, the Germans resorted to imprisonment, threats of deportation, and various other methods of intimidation. At Malines all vehicular traffic was stopped for ten days, and a number of workmen were finally seized and taken by force to the arsenal where they were compelled to work against their will.⁸⁵

At Sweveghem-les-Courtrai, in Western Flanders, where the military authorities undertook to compel the employees of a wire factory to manufacture barbed wire, the town was "isolated" by surrounding it with troops and allowing no one to enter or leave, even for the purpose of revictualling the population. The mayor was forced to post a proclamation stating that the workmen would bear no responsibility after the war on account of their compulsory resumption of work.⁸⁶

⁸⁴ German, French, and Flemish texts in the Belgian official Report (French ed.), p. 80.

⁸⁵ In July, 1916, a Canadian prisoner named Simons, who had been transferred to an internment camp in Switzerland, charged that a number of Canadian prisoners had been sentenced to jail for a year on account of their refusal to work in the German munitions factories. *New York Times*, July 15, 1916. The attempt of the Germans to compel Belgian railway employees to work is detailed in Massart, pp. 300 ff.

See, also, a communication of Sir Edward Grey to the ministers of the Netherlands, Spain and the United States protesting against the German policy of compelling Belgians to work in munitions factories. *New York Times*, July 4, 1916.

⁸⁶ Reports on the Violations of the Laws of Nations in Belgium, pp. 78-79.

The town of Harlebeke near Courtrai was punished by an order prohibiting the Belgian Food Committee from supplying the town with food, and by the closing of all cafés and the keeping of the people indoors between the hours of 4 P.M. and 7:00 A.M., because the women of the town refused to do "military work" for the Germans. Twenty-nine of the female offenders were deported to Germany as prisoners. The town of Lessines was fined because the women "refused to work for the German army."

At Menin, in July, 1915, a notice was posted by the German military authorities informing the inhabitants that the town would no longer be permitted to provide assistance of any description to the wives or children of any man who refused to do *military work or perform other tasks* assigned by the German authorities.

The village of Lokeren near Liège was punished with "isolation" because the working population refused to assist the Germans in the construction of military works.⁸⁷

Because the quarrymen at Lessines refused to resume work, on the ground that the stone produced would be used by the Germans in the construction of military trenches, 96 leading citizens of the town are alleged to have been taken before a military court, which imposed upon them fines varying in amounts and sentenced the Burgomaster and a number of quarrymen, contractors, and workmen to different terms of imprisonment.

At Hainaut 94 persons are alleged to have been sentenced to prison for terms varying from two months to five years each for similar conduct.⁸⁸ In November, 1915, Belgian coal miners, it was charged, were then working the mines near Liège under the compulsion of a half-dozen threatened punishments, including death.

Partly on account of the refusal of the Belgian workingmen to perform labor for the Germans, partly in consequence of the enforced closing of many industrial establishments by the taking away to Germany of their machinery and equipment, and partly on account of the lack of raw materials without which various

⁸⁷ Boston *Transcript*, Nov. 13, 1915, quoting from the *Echo Belge*, a newspaper which Von Bissing had attempted to suppress but without success.

⁸⁸ See the Official Belgian Report (English ed.), p. 53.

manufacturing industries could not be carried on, large numbers of workingmen in Belgium were thrown out of employment. Under the pretext that the situation caused by the prevalence of idleness on so large a scale constituted a menace to the public order and conduced to the "physical and moral deterioration of Belgian workingmen," the German authorities in the autumn of 1916, decided to adopt the drastic remedy of wholesale deportation of the Belgian unemployed to Germany. Accordingly, many thousands (the number has been estimated as high as 300,000) were arrested and forcibly carried to Germany and put to work on the farms, in coal mines and various industrial establishments, the effect of which was to release large numbers of Germans for service in the army. Whether, as the Belgians allege, the measure was intended as a punishment for their refusal to work for the Germans in Belgium, or whether it was honestly undertaken in the interest of the public order and to protect the working population of Belgium from "moral and physical deterioration," it cannot be defended. If it is lawful for a belligerent to deport a large part of the peaceful population of a country which he has succeeded in subjugating, hold it virtually in a condition of slavery, and compel it to work in his own industries, especially when the effect, if not the purpose, is to free an equivalent of his own men for service in the army or for labor in industries upon which the carrying on of war is dependent, the prohibitions on belligerents in favor of the rights of the inhabitants of occupied territory, and especially that in respect to compulsory service for the military benefit of the enemy, are illusions. The measure must be pronounced as an act of tyranny, contrary to all notions of humanity, and one entirely without precedent in the history of civilized warfare.

Many charges have also been made against the Germans of forcing the inhabitants to serve as guides. The practice of exacting the service of guides from among the inhabitants of occupied territory was formerly a universal one.⁸⁹ But it was condemned by the First Hague Conference, and the prohibition was renewed by the Conference of

⁸⁹ Westlake, *International Law*, Pt. II, p. 101; Pillet, p. 199.

1907. Article 44 of the Convention of 1907 respecting the Laws and Customs of War on Land is as follows:

A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent or about its means of defense.

Holland is one of the few authorities of repute who entertains doubt that this article forbids the employment of forced guides, and his explanation is that a proposal to insert an express provision forbidding the impressing of guides was opposed by Germany, Austria-Hungary, Russia, and Japan.⁹⁰ But most of the other authorities held the contrary view, and it is quite certain that the committee which approved the article at The Hague in 1907 intended that it should forbid the compulsory employment of guides.⁹¹ Japan, Germany, Austria-Hungary, Montenegro, and Russia, however, reserved their ratifications to Article 44, and it is not, therefore, technically binding on any of the belligerents in the present war. Nevertheless, they all accepted Article 23, which forbids compulsory service in the "operations of war," an expression which is quite broad enough to exclude the taking of guides. And this is the view of most of the authorities.

The German General Staff in the *Kriegsbrauch im Landkriege*, how-

⁹⁰ Laws of War on Land, p. 53.

⁹¹ Spaight, p. 369; Westlake, II, p. 101-102; Hershey, p. 411; Higgins, p. 269; Lawrence, p. 418.

It will be recalled that the Austro-Hungarian delegate proposed to add the words "as combatants" after the words "take part" in Article 23h, with a view to prohibiting compulsory service only in respect to combatant operations. The French, Belgian and Swiss delegates opposed the amendment on the ground that it would have the effect of legalizing the taking of guides from the civil population. The Austro-Hungarian and Russian delegates urged it for this very reason, because, they said, the taking of local guides would often be indispensable to a belligerent in mountainous countries where the roads were unknown to them. General den Beer Poortugael, and other delegates, objected on the ground that the forced taking of guides was immoral. The rejection of the Austro-Hungarian proposal would seem to indicate, therefore, that the Conference intended that the articles as finally adopted should not allow the forced taking of guides. The whole matter is discussed by Higgins, The Hague Peace Conferences, pp. 267-269. Oppenheim (II, p. 121), however, seems to hold that it is still permissible to exact the services of guides. See, also, Calvo, Vol. IV, sec. 2120.

ever, refuses to accept this view. However much the taking of guides, it says, "may ruffle human feeling, no army operating in an enemy's country will altogether renounce this expedient." It even upholds the right of a belligerent to compel the inhabitants to furnish information about their own army, its strategy, its resources, and its military secrets. It admits that the majority of writers of all nations condemn the practice, but nevertheless it cannot be entirely dispensed with — "*Kriegsraison* will make it necessary."²²

It is difficult to see how the practice can be defended on any other theory than that a belligerent has a moral and lawful right to force the inhabitants to take part in the military operations of the enemy, for such it amounts to. A competent guide, as Spaight very properly remarks, may be of far more value to a general operating in a strange country than very many troops, and it is quite illogical to forbid him to impress soldiers if you permit him to impress a guide whose employment may be more militarily important and infinitely more damaging to the enemy than a thousand men in the ranks.²³ It is a cruel measure, says Bonfils, for he who guides an army of invasion commits an act more injurious to his own country than if he fought in the ranks of his enemy.²⁴ Pillet expresses substantially the same opinion.²⁵ The French official Manual for the use of army officers condemns it as irreconcilable with the rights of persons. "It is evident," says the French Manual, "that the person who is forced to guide or facilitate the expeditions of the enemy finds his patriotism cruelly undermined." Even some German writers condemn it as illegitimate.²⁶

It is probably safe to assume that many of the charges against the Germans in respect to the exaction of compulsory labor of the

²² Morgan, *The War Book of the German General Staff*, p. 153. See the criticism of this doctrine by Mérignhac, *Les Lois de la Guerre Continentale suivant le Grand Etat-Major Allemand*, p. 33.

²³ *War Rights on Land*, p. 370.

²⁴ *Op. cit.*, sec. 1149.

²⁵ *Lois Actuelles*, p. 144. Compare also Mérignhac, *op. cit.*, p. 33.

²⁶ For example Loening, *L'Administration de l'Alsace-Lorraine*, *Rev. de Droit, Int.*, Vol. IV, p. 649; Strupp, *Das internationale Landkriegsrecht*, p. 71; Huber, *Jahrbuch des öff. Rechts*, 1908, II, 570; Meurer, *Die Haager Friedenskonferenz*, p. 246; Zorn, *Kriegsrecht zu Lande*, p. 279.

Belgians are exaggerated and some of them may be without foundation. The evidence, however, is sufficient to warrant the conclusion that in the main they are true. It is not without significance, in this connection, that the German White Book "The Belgian People's War," (*Die Völkerrechts widrige Führung des Belgischen Volkskriegs*), which contains an elaborate defense of the measures of reprisal adopted by the Germans in Belgium, does not deny the Belgian charges in respect to spoliations under the disguise of requisitions nor those regarding forced labor.

The Germans have, of course, proceeded on their traditional theory as to the rights of a military occupant, and it must be admitted that the writers on international law recognize a fairly wide latitude to belligerents in respect to requisitions of labor and services of the inhabitants of occupied territory. Even Bonfils holds that "the inhabitants may be required by the enemy to transport by means of their own horses and vehicles necessary supplies for the army, the wounded, prisoners, and troops." Although of great use to the enemy who requires these services, he continues, they do not constitute direct and immediate participation in the operations of the war. And, he concludes, if a belligerent has a right to exact certain personal services, it must be admitted that he has a right to punish the inhabitants for refusing them.⁹⁷ Pillet, one of the most authoritative of French writers on the laws of war, says

An army of invasion penetrating enemy territory, always utilizes in a certain measure the services of the peaceable inhabitants whom he finds there — it is thus that the conqueror does not hesitate to take from the civil population of the place which he occupies, the convoys and the laborers which he needs for the different works which his presence renders necessary. He is served by non-combatants for the works of encampment, for the repair of roads and bridges, to bury the dead, to care for the wounded and for a

⁹⁷ *Droit Int. Pub.*, secs. 1147-8 and 1150. Bonfils, however, strongly condemns the act of Count Renard, German prefect at Nancy, who in 1871 threatened to shoot a number of laborers in case his demand for 500 workmen to reconstruct a bridge was not complied with. But the *Kriegsbrauch im Landkriege* attempts to justify the threat on the ground that it accomplished the purpose desired without it being necessary to carry it out. Morgan, pp. 144-145. It is also defended by Strupp, *op. cit.*, p. 113.

variety of other services which it would be impossible to enumerate completely. This power, however, is limited by the rule which prohibits an army of invasion from employing the inhabitants to perform work which constitutes a participation in the hostilities directed against their country.

No doubt, the different kinds of work enumerated above serve hostilities, since they are useful to the enemy's army to facilitate his hostile action, but at least they do not constitute direct acts of hostility.⁹⁸

The true line of demarcation between services which are permissible and those which are not, according to Pillet, is that between the passive and active character of the service; that is, the service must not result in a particular or direct danger to the adversary of the belligerent who requires it.

To go beyond this limit would be to force men to betray their country, that which is contrary to the first principles of a loyal war. Thus, the inhabitants cannot be compelled to erect fortifications, manufacture ammunitions, repair damaged arms, and still less to furnish the enemy with information concerning the location and operation of the troops of their country.⁹⁹

Lawrence likewise calls attention to the obvious fact that the line of demarcation between permissible and forbidden services is shadowy, "but," he adds, "the underlying principle is clear. To drive a herd of bullocks to a slaughter pen is a very different thing from driving an ammunition wagon into a field of conflict."¹⁰⁰ Holland points out that the substitution of the phrase *any operations of war* in Article 23h of the Convention of 1907 in the place of *military operations*, the language employed in the Convention of 1899, increases the immunity of the inhabitants against the right of a belligerent to exact services of them, since the former term includes many acts not amounting to what would be described as *military operations*. He adds, however, that the language is still ambiguous, and he raises, without answering, the query whether it would be lawful for a belligerent to compel hostile nationals to aid in the construction of urgent public works, such as the repair of roads and bridges.

⁹⁸ *Les Lois Actuelles de la Guerre*, sec. 135.

⁹⁹ The French *Manuel de Droit International* (pp. 110, ff.) for the use of the army officers, emphasises very clearly this distinction.

¹⁰⁰ *Principles of Int. Law*, p. 419 (4th ed.).

The great majority of jurists and writers deny the right of a belligerent to compel persons of hostile nationality to work on the fortifications of the enemy.¹⁰¹ For the same reason the compulsory digging of trenches must be condemned, so must the driving of ammunition wagons, the cutting of stone for trench supports and the production of barbed wire for the erection of military defenses. For still stronger reasons forced work in arsenals for the production of arms and munitions to be used by the enemy against the countrymen of those who are thus constrained is not permissible. It may also be doubted whether forced labor in railway shops and in the operation of railway trains which are used by the enemy for the transportation of troops and military supplies is permissible. The line of demarcation between such services and work on fortifications is at best very shadowy, and there is no principle of logic or reason why a belligerent should be allowed to require the one and forbidden to exact the other. Indeed, under the conditions of modern warfare, work in wire and munition factories, in stone quarries and in the railway service may be of infinitely greater value to a belligerent than the services which are expressly forbidden by the Hague Convention. The services of Belgian railway employees, in particular, was of immense military value to the Germans, not only because it released large numbers of Germans and left them available for services in the army, but because, owing to the different construction of Belgian railway locomotives and railway machinery as compared with those in use in Germany, the operation of the Belgian lines by Germans was carried on with difficulty and resulted in numerous accidents. The services of Belgian engineers, machinists and trainmen were, therefore, as necessary to the Germans as soldiers in the field. If this be true, on what principle should a belligerent be allowed to requisition the services of the former and yet forbidden to impress the inhabitants to act as guides or to serve in his ranks?

¹⁰¹ Oppenheim is one of the few exceptions. He holds that a belligerent may not only requisition drivers, guides, farriers, etc., but he may require "the execution of public works *necessary for military operations*, such as the building of *fortifications*, roads, bridges, soldiers' quarters and the like." *International Law*, Vol. II, pp. 121-122. But, as Spaight (*War Rights on Land*) observes, he gives no authority for his statement.

Naturally, the German General Staff in the *Kriegsbrauch im Landkriege* defends the claim of belligerents to exact such services. In the list of the requisitionable services which it enumerates we find "the furnishing of conveyances" and "the performance of work on streets, bridges, trenches, railways, buildings, etc." The contention that the exaction of these and similar services is to compel the inhabitants to participate in military operations of the enemy it emphatically rejects. *Kriegsraison* must decide.¹⁰² But this extreme view cannot be admitted. The right of a belligerent to exact personal services of the peaceable inhabitants of an occupied district, as Nys justly remarks, constitutes the last application of the *corvée*, and it should be forbidden because it is no longer in conformity with the juridical rules of modern war nor even with the conditions under which it is conducted.¹⁰³ It is repugnant to every notion of patriotism and to the elemental principles of justice to require the civilian inhabitants of conquered territory to perform services for an enemy the direct effect of which is to contribute to the success of his military operations, and it is none the less so because the effect is only indirect.

Some of the measures and expedients resorted to by the Germans in Belgium to compel by force the inhabitants against their sentiments of patriotism and loyalty to render services which they objected to performing, and particularly the commercial isolation of their towns, the imposition of fines, the interdiction of relief to the unemployed and the deportation to Germany of those who refused to work for the enemy, were acts of extreme severity which cannot be justified except on the theory that the rights of a military occupant over the inhabitants who have fallen within his power are subject to no limitations other than his own arbitrary will.

JAMES W. GARNER

¹⁰² Morgan, War Book of the German General Staff, p. 152. Stein, an Austrian writer, (*Rev. de Droit Int.*, Vol. XVII, p. 349), defends the right of a belligerent to compel the employees not only of state railways but also those of private lines to operate the roads by which they are employed. Moynier, however, adopts a contrary view (*ibid.*, Vol. XX, p. 365), and so does Buzzati (*ibid.*, Vol. XX, p. 402).

¹⁰³ *Réquisitions et Contributions*, *Rev. de Droit Int. et de Lég. Comp.*, Vol. 38 (1906), p. 284.

THE ORIGIN OF THE UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS

BETWEEN December, 1805, and February, 1815, no treaty was laid before the United States Senate for its constitutional action. Yet there are few periods in the history of this country during which its relations with the governments of Europe played a greater part in the political, social, and economic life of the people, or exercised a more potent influence on the destiny of the nation. For ten years preceding the Treaty of Ghent, at every session of Congress a large proportion of the most important business transacted had to do with French decrees and British orders in council, with impressment, with Spanish aggressions on the southern border, with the Barbary corsairs, with embargoes, with enforcement acts, with the privileges of foreign ministers, with the maintenance of neutrality, with wars and rumors of wars. Domestic politics turned on foreign issues; the greatest men in both parties gave to foreign affairs their first thought and their gravest attention. It was during this decade, as crowded with diplomatic strivings and international activity as it was devoid of international agreements, that the Committee on Foreign Relations of the United States Senate came into being.

The antecedents of the committee, however, must be sought in the records of the earliest years of government under the Constitution. The practice of referring the business of treaty-making to select committees began with the reception of the first Presidential message on the subject. During Washington's administrations, however, there was no standing rule providing for such reference, and committees were used when and as the Senate saw fit — as the convenience of the moment dictated. But even in these circumstances there appears to have been a strong tendency to concentrate responsibility in treaty affairs in the hands of a few men. During the first eight years of the government eighteen treaties with Indian tribes

and foreign nations¹ were submitted to the Senate for its advice and consent to ratification. Its advice was sought in the interpretation of one other treaty. In the consideration of these nineteen treaties the Senate employed nineteen committees, to which were referred questions connected with the negotiation, ratification, or interpretation of eleven different treaties. The total membership of these nineteen committees was sixty-eight, while sixty-six individuals served in the Senate during these years. Yet these sixty-eight committee places were filled by just twenty-four Senators; that is, two more than a third of the Senate membership did all of the committee work on foreign and Indian treaties.

Nor do these figures tell the whole story of specialization and concentration of power in this field. Of the twenty-four Senators who served on these committees, five held more than half of the sixty-eight places. These five were the most powerful Federalist members of the upper house. Caleb Strong served on nine committees, Robert Morris on eight, Rufus King and Oliver Ellsworth on seven each, and George Cabot on four. Nor is the situation altered when only those committees which acted upon treaties with foreign nations are considered. There were ten such committees, whose membership totaled forty-two, and upon which sixteen different individuals served. The five Federalist friends whose names have been mentioned held twenty-six of these forty-two places. In addition they were primarily responsible for the Jay Treaty from the conception of the idea to the ratification of the completed instrument — and this despite the fact that the Senate appointed no committee on this matter.

These facts would seem to lead to the conclusion that during Washington's administrations there was a comparatively small group of members to whom the Senate regularly intrusted a large part of the work which devolved upon it in the performance of its treaty-making functions, and to whom it habitually looked for guidance in this field. It is evident, however, that it did so not in accordance with any rule or fixed precedent, perhaps not even consciously, but simply because this was the easiest method of transacting this sort of business. It was only through succeeding years that the Senate

¹ This includes additional articles upon which the Senate took separate action.

committee on foreign relations to which all business concerning foreign affairs invariably was referred.

The first committee of this exceptional character existed during the third session of the first Congress. In his annual message, delivered December 8, 1790, Washington called the attention of Congress to the distressed condition of American commerce in the Mediterranean, and recommended that measures be devised for its relief and protection.³ A week later the Senate ordered that "Messrs. Langdon, Morris, King, Strong, and Ellsworth be a committee to consider that part of the President's speech which refers to the commerce of the Mediterranean."⁴ The form of this order is worthy of note, because it was in this manner that the Senate in later years raised the committees which developed into the Committee on Foreign Relations. In fact, the entire standing committee system of the Senate grew out of the reference of particular parts of the annual messages to select committees. This practice, however, did not become general until after 1797.

The particular committee here under discussion continued in active existence throughout the session, and possessed a greater number of the characteristics of the later standing committees than did any committee raised for ten years afterwards. To it was entrusted all of the business concerning American captives in Algiers, the protection of American trade in the Mediterranean, and our commercial treaty with Morocco.⁵ Each matter was referred as it arose, and the Senate usually named the committee as that "appointed on the 15th day of December to consider that part of the President's Speech which relates to the commerce of the Mediterranean."

At the beginning of the next session of Congress six committees were appointed to consider particular matters of business mentioned in the President's address, but with the possible exception of one on consuls and vice-consuls, none of these had to do with treaties or

³ Annals of Congress, 1789-1791, II, 1730.

⁴ *Ibid.*, p. 1735.

⁵ *Ibid.*, pp. 1740-1741; 1743-1744, 1749, 1753, 1763, 1774-1776; Compilation of Reports, Senate Committee on Foreign Relations, IV, 5-6; Senate Executive Journal, I, 72, 78.

foreign relations.⁶ Shortly afterwards, however, a petition asking that Congress reimburse private individuals who had ransomed an American captive at Algiers was referred to a committee with the same personnel as the Algerine committee of the preceding session, except that Butler was substituted for Ellsworth.⁷ During the remainder of the session all business pertaining to Algiers was referred to this group. At the same time, however, other matters concerning our relations with foreign nations were referred to other select committees, so that in neither session did there exist a body which with any degree of accuracy could be called a committee on foreign relations.

The non-existence during this period of any such committee may be admirably illustrated by a recurrence to the proceedings of the Senate during the first session of the third Congress. During this session of 1793-94 the situation was tense between the United States and France, England, and Spain, and much of the time of Congress was occupied with foreign affairs. On December 5, 1793, Washington communicated a message with a great mass of papers upon French-British-American relations. These were soon followed by a similar communication upon Spanish affairs. On January 15th additional papers revealing the situation between the United States and France were sent in, and on the day following a message with further documents touching the same subject. A week later extensive extracts from the dispatches of our minister at London were given to Congress, and on the next day the Senate passed a resolution requesting Washington to lay before it the correspondence of our minister at Paris with the French Government and with the Department of State. During February, March, and April other communications on foreign relations were received from the President.⁸ Yet not one of these messages was referred to a committee, and during the entire session only two committees were raised that had anything to do with foreign affairs.

⁶ Annals of Congress, 1791-1793, pp. 24-25.

⁷ *Ibid.*, pp. 26, 29, 41; Compilation of Reports, Sen. Com. For. Rels., VIII, 6; Senate Executive Journal, I, 91.

⁸ Annals of Congress, 1793-1795, pp. 14-15, 19, 31, 32, 37, 38, 55, 56, 62, 80; Am. State Papers, For. Rel., I, 141-243, 277-288, 309-311, 312-314, 315-323.

During the administration of John Adams little conscious progress was made in the development of a standing committee on foreign relations. Possibly for the very reason that during these years the attitude of the United States toward France, England, and Spain was the paramount, or at least the most spectacular issue of national politics, the Senate preferred to act directly in foreign affairs. The nearest approach to a foreign relations committee was made during the long and momentous session which began on November 13, 1797. At the opening of the special session of the preceding summer Adams had recommended the strengthening of the navy as a measure of precaution against further trouble with France.⁹ In his first annual address he again urged that every exertion should be made for the protection of our commerce — and that the country should be placed in a suitable posture of defense.¹⁰ Two weeks later the Senate ordered that "Messrs. Goodhue, Laurance, Tracy, Bingham, and Gunn, be a committee to take into consideration that part of the President's speech, which recommends some measures being adopted for the security and protection of the commerce of the United States; and to report thereon by bill or otherwise."¹¹ During the seven months of this session scarcely a day passed that these five men were not engaged in considering one or more measures having to do with, or arising out of our relations with France. Almost all of the measure of defense and offense that arose out of the French quarrel either originated with them or passed through their hands. To this committee was referred the message in which the President set forth the flagrant violations of American neutrality by the French privateer *Vertitude*, after that vessel had sunk a British merchantman in Charleston harbor. They received for consideration Adams' pessimistic communication of March 19th — which declared that there was small chance of our envoys accomplishing the objects of their mission, and recommended energetic measures of defense. In this committee originated the bills by which the Senate proposed to cope with the situation, and to them were referred also those measures which were

⁹ Richardson, Messages, I, 233-239.

¹⁰ *Ibid.*, pp. 250-254.

¹¹ Annals of Congress, 1797-1799, I, 475.

sent up from the House. On June 21, 1798, they presented the bill declaring the French treaties to be void and of no effect. All told, they reported eight Senate bills and received for consideration seven House bills concerning measures affecting our relations with France, each of which they piloted through its course in the Senate. In addition, they reported one resolution and considered two Presidential messages which were referred to them.¹²

Yet despite this activity, a careful study of the proceedings of the session reveals how far this group was from being a committee on foreign relations, or even on French affairs. It also demonstrates conclusively that at this time no such committee existed, or was considered to exist. Of the eight messages with which Adams laid before Congress the correspondence of our unfortunate envoys to France, and other documents of like nature, only two were referred to this committee. The other six were considered by the Senate as a whole, and not one of them was given to any committee. In most cases the message and accompanying documents were ordered to be printed, and then were acted upon directly by the Senate as it saw fit.¹³

It was almost at the end of Jefferson's second administration, during the memorable special session of 1807-1808, that the natural tendency of the Senate to follow the lead of a relatively small group of men in the transaction of a particular sort of business gave rise to a real, although not a recognized standing committee on foreign relations. During the session the following matters, dealing directly with British relations or with measures made necessary by them, were either referred to or reported from select committees: so much of the annual message as related to the recent outrages of British armed vessels within the jurisdiction of the United States, and to the legislative provisions which might be expedient as resulting from them; Jefferson's embargo message; the embargo bill; the enforcement act, sent up from the House; the House bill to continue the

¹² *Annals of Congress*, 1797-1799, I, 497-498, 505-506, 523-525, 529, 540, 542-543, 548, 571-573, 585-586, 590-591, 597, 604, 609; *Am. State Papers, For. Rel.*, II, 116-119, 152.

¹³ *Annals of Congress*, 1797-1799, I, 516, 517, 555, 571, 581, 585-586; *Am. State Papers, For. Rel.*, II, 150-151, 153-163, 169-182, 185-188, 188-199, 199-201.

act to protect American commerce and seamen from the Barbary Powers; Jefferson's message submitting the British orders in council of November 11, 1807; the supplemental non-importation act from the House; a plan from the President for an increase in the army; the House bill supplementary to the embargo; the message submitting the papers concerning the Leopard-Chesapeake affair; the Monroe-Pinckney negotiation, and the correspondence upon the subject of the rejected treaty, and all of the correspondence with reference to the negotiations with France; the bill authorizing the President to suspend the embargo under certain conditions; a report reviewing the condition of our foreign relations and recommending a continuance of the existing policy; a supplementary embargo bill; and, finally, House amendments to this bill.¹⁴

An examination of these measures at once discloses a certain unity in all of them; all are directed to a common purpose. It might be expected, then, that they would have been referred to one standing committee — say upon British relations and national defense. Or, they might have been divided into two groups, one including those bearing directly on British relations, and the other those having to do with measures of defense. As has been said, however, each was referred to a select committee raised on that one subject. But, and here is the interesting development, all of the eleven committees created were composed of a very small number of men—men who were leaders in the upper house. The extent to which this concentration of control was carried is indicated by an examination of the make-up of the committees. John Quincy Adams served upon every one of them, and was chairman of one; General Samuel Smith of Maryland upon ten of the eleven, and was chairman of seven; Anderson of Tennessee upon five, and was chairman of two; Bradley of Vermont upon five; Mitchell of New York, and Gregg of Pennsylvania upon three; Giles of Virginia upon two, and was chairman of one; and Gaillard, Sumter, Hillhouse, and Milledge upon one each. The forty-three committee places were held by just eleven men, and of the eleven four sat upon only one committee.

¹⁴ *Annals of Congress, 1807-1808*, pp. 19, 34, 50-53, 63-64, 78, 79, 104, 127, 151, 153, 173-174, 178, 186, 361-371, 378.

Thus, although formally the Senate appointed eleven select committees, each independent of the others, yet the sum-total of these bodies in membership practically amounted to a standing committee of eleven members, or, if the four men serving on just one committee be eliminated, of seven. In this instance, as in many others to be found in the study of the procedure of legislative bodies, the fact preceded the form; the institution, a standing committee on foreign relations, was gradually creeping into existence before it was formally recognized and named.

From 1807 on, the development of the committee took on a more obvious form. As has been intimated, it finally grew out of the custom of referring to select committees given subjects mentioned in the annual messages. Such a committee was raised on so much of Jefferson's last annual message as concerned our relations with the Barbary powers.¹⁵ A year later Madison's message set forth the critical condition of the relations of this country with Great Britain and Spain, and with it the President submitted to Congress diplomatic correspondence showing the situation with reference to these nations.¹⁶ On the day following its delivery, Giles, of Virginia, submitted the following resolution for consideration:

Resolved, That so much of the message of the President of the United States as respects the relations existing between the United States and Great Britain and France, with the accompanying documents, be referred to a select committee, with instructions to examine the same and report thereon to the Senate; and that the committee have leave to report by bill, bills, or otherwise.¹⁷

The resolution was adopted by the Senate, and Giles, Pope, Bradley, Goodrich, Leib, Sumter, and Gillman were chosen to be the committee.¹⁸ This committee, or its leaders, all through the session played a predominant part in the haphazard efforts of the politicians in the Senate at once to stave off a war with England and to safeguard American interests, so far as was consistent with economy,

¹⁵ Annals of Congress, 1807-1808, p. 19.

¹⁶ Richardson, Messages, I, 473-477.

¹⁷ Annals of Congress, 1807-1808, p. 478.

¹⁸ *Ibid.*, pp. 478-479.

Republican principles, and their own personal political ambitions. It was this committee that reported Giles' famous resolution, verbally castigating His Britannic Majesty's minister, Francis James Jackson, for the imputations of bad faith which he had cast upon the government, and pledging to the executive the support of Congress in repelling his insolence. At the same time it brought in a bill to prevent the abuse of the privileges and immunities enjoyed by foreign ministers in the United States.¹⁹ Early in January the message from the President recommending an increase in the army and the organization of the militia was referred to the same committee. A week later Giles reported for the committee a bill authorizing the President to man, fit out, and officer the frigates of the United States. In this connection the committee had carried on a correspondence with the Secretary of the Navy, which was now ordered to be printed. On the last day of the month Mr. German presented resolutions providing for convoys for American merchantmen, and this proposition was referred to Giles' committee. The non-intercourse bill which came up from the House and which was intended to replace the expiring embargo, was intrusted to another group, while a House bill providing for the protection of Mediterranean commerce was passed without any reference whatever.²⁰ But Giles and his colleagues participated in the action of the Senate upon these measures, and, indeed, the committee exercised a potent influence over the Senate during this session in all matters pertaining to England and France.

Early in the session commencing in December, 1810, again upon motion of Giles, the Senate adopted a resolution in terms identical with the one of 1809 setting up a committee on so much of the annual message as referred to the relations between the United States, Great Britain, and France.²¹ Giles, Crawford, Anderson, Goodrich, and Pope were chosen to serve, all except Goodrich being Republicans of national prominence. To these men were referred

¹⁹ *Annals of Congress*, 1808-1809, pp. 481-482; see also Moore, *International Law Digest*, IV, 511-513.

²⁰ *Annals of Congress*, 1808-1809, pp. 520, 526, 530-531, 550, 587.

²¹ *Annals of Congress*, 1810-1811, p. 16.

petitions of individuals asking to be relieved from some of the provisions of the Non-intercourse Act.²² As a matter of fact, however, the committee was of slight consequence during this session, because the absorbing subject of interest during the winter of 1810 was that of the Floridas; and the measures by which the Senate proposed to bring this territory under the control of the United States were referred to other committees. Upon so much of the President's message as concerned the occupation of West Florida was raised a committee composed of Giles, Pope, Anderson, Crawford, and Bradley.²³ This was done upon motion of Giles, and it is to be noticed that, except for the substitution of Bradley for Goodrich, the only Federalist in the other group, the two committees were identical. In response to a confidential message from Madison, the subject of East Florida was taken up in secret session. Three measures were passed in this connection: an act authorizing the President to take possession of the country, a resolution declaring to the world the position of the United States with reference to this territory, and a resolution ordering that these acts be not published without the direction of the President.²⁴ Three committees acted in the transaction of this business. The first was composed of Clay, Crawford, Bradley, Smith of Maryland, and Anderson; the second of Bayard, Crawford, and Clay; the third of Anderson, Crawford, Clay, Bradley, and Smith of Maryland.²⁵ It will be observed, of course, that the personnel of these committees and of the two earlier chosen was strictly limited. All five, in fact, were composed of a small group of the leading Republicans of the upper house. Yet formally each group was a separate, independent, select committee, bearing no organic relation to any of the others.

Again, at the beginning of the session of 1811-1812, so much of the annual message as concerned the relations between the United

²² *Ibid.*, pp. 21, 250.

²³ *Ibid.*, p. 10.

²⁴ See Richard Hildreth, *History of the United States*, III, xxiii; Henry Adams, *History of the United States*, V, xv; F. E. Chadwick, *Relations of the United States and Spain, Diplomacy*, Ch. VI. It was in connection with this matter that Pickens was censured by the Senate for reading confidential papers in open session.

²⁵ Senate Executive Journal, II, 176, 182.

States, France, and Great Britain was referred to a select committee. Giles, Crawford, Gregg, Franklin, Lloyd, and Pope were named, Giles being once more the chairman.²⁶

The committee which was appointed a year later marked in its title an advance towards the form which later became the accepted one. In his annual message of 1812, Madison had adverted to our relations with Great Britain, with whom we were at war, with France, Denmark, Russia, Sweden, and the Barbary States.²⁷ On the day following, four motions were submitted providing for the reference of four of the most important subjects treated in the message to as many select committees. The first resolution includes so much of the message as concerned "our relations with foreign powers, the Military Establishment of the United States, and volunteers."²⁸ All four resolutions were adopted, and Franklin, Campbell of Tennessee, Taylor, Varnum, Howell, Robinson, and Worthington were chosen to serve on the first-named committee. This committee was active throughout the session, and exhibited more of the characteristics of a real committee on foreign relations than had any of its predecessors. Early in the session a communication from Madison concerning the attempt which had been made through Jonathan Russell to bring about a suspension of hostilities with Great Britain was referred to it as "the Committee on Foreign Relations."²⁹ A few days later another letter on the same subject was referred to the "committee who have under consideration so much of the message of the President of the United States, of the 4th instant, 'as concerns our relations with foreign Powers.'" This matter of nomenclature may be of little importance in itself, but it is not without interest to observe how the name of this great committee gradually came into use. During this and several sessions following, the title "Committee on Foreign Relations" frequently, in fact usually, was applied to the body appointed under the sort of resolution which

²⁶ Annals of Congress, 1811-1812, pp. 15-17.

²⁷ *Ibid.*, 1812-1813, pp. 13-14.

²⁸ *Ibid.*, p. 17. The other subjects were: The naval establishment of the United States; American vessels which had arrived in the United States laden with British manufactures; the revision of the militia laws.

²⁹ Annals of Congress, 1812-1813, p. 19.

has been described. On the other hand, the committee often was referred to in other ways — described, rather than named.

A review of the measures which came before the committee during this session reveals a slight increase in the specialization of its functions. It was occupied with fewer matters not bearing directly on foreign relations, and at the same time the Senate passed or considered a smaller number of measures in this particular field without consulting it.³⁰

A conscious step towards the specialization of the function of the committee was made when Congress met in May, 1813. On the day following the reading of Madison's message, a resolution was introduced providing that so much of it as concerned our relations with foreign Powers and the military establishment be referred to a select committee. At the same time it was moved that the part of the message relating to the naval establishment be referred to another committee. The next day, however, military affairs were separated from foreign relations, select committees being set up on each of the three subjects.³¹ During this session, also, a still greater homogeneity is to be observed in the measures considered by the committee, practically all of the business arising from our troubles with Great Britain passing through its hands.³² At the same time, however, a very important part of the business of the Senate in the field of foreign relations was being carried on with the assistance of other groups. Early in the session Madison submitted to the Senate the nominations of Gallatin, Adams, and Bayard as peace envoys, along with that of Jonathan Russell as minister to Sweden.³³ The nominations of Gallatin and Russell were opposed, largely from political motives, but in the former case for the ostensible reason that the position was incompatible with that of Secretary of the Treasury, and in the latter upon the ground that it was inexpedient at that time to send a minister to Sweden. A bitter struggle followed, which resulted in the rejection of both names. The fact of interest is that in considering the nominations, and in carrying on its struggle with

³⁰ *Ibid.*, 1812-1813, pp. 18-19, 21, 27, 39, 94, 101, 104, 105, 112, 113, 115, 117, 121.

³¹ *Ibid.*, 1813-1814, pp. 18-19. ³² *Ibid.*, pp. 25, 31, 36-39, 45, 47, 55, 59.

³³ Senate Executive Journal, II, 347.

the President over them, the Senate acted through select committees, rather than through the group which had been appointed at the beginning of the session to consider foreign relations. Not only that, but a comparison of the personnel of these committees with that of the Foreign Relations Committee shows that the membership of the former contained by far the weightier Senators.³⁴ A few years later neither of these conditions would have existed.

During the second session of the thirteenth Congress, which met in December, 1813, the functions of the Committee on Foreign Relations possessed even greater unity, and were of larger importance than during previous years. An enumeration of the matters of business coming before it is, perhaps, the most effective means of setting forth its functions at this time. During the session it had under consideration the following measures: the message of the President recommending an embargo, a bill which it reported in response thereto, and the House embargo bill which ultimately became law; the bill, which it reported, prohibiting the importation of certain articles derived principally from Great Britain; Madison's message submitting to Congress the British rejection of Russian mediation, and Lord Castlereagh's offer to treat for peace directly; the message recommending the repeal of the embargo and the extension of additional duties for a period of two years after the war; two petitions on this subject; the bill for the repeal of the Embargo Act; a proposal to pass an act prohibiting the exportation of sheep from the United States; a bill, which it reported but which failed to pass, prohibiting the exportation of specie, gold or silver coins, or of bullion; bills providing for the more effectual enforcement of the Non-Importation Act, and for the return to their own districts of vessels detained in other districts under the terms of the Embargo Act, and, finally, numerous bills for the relief of individuals seeking exemption from pains and penalties incurred by alleged violations of the Non-Importation and other war Acts.³⁵

³⁴ Senate Executive Journal, II, 347, 352, 354, 395. Adams' History of the United States, VII, 59-64, presents a most interesting discussion of this struggle, its outcome, and its political significance.

³⁵ Annals of Congress, 1813-1814, pp. 459, 550, 551, 562, 565, 570, 601, 613,

These measures comprise all of the more important matters of general business arising out of the foreign relations of the United States at this time. All had some bearing on the war with Great Britain, and all were legislative in their character. But during this session no business concerning our relations with any other Power came before the Senate, except the appointment of foreign ministers. This subject, of course, was considered in executive session, and no committees were employed in connection with any diplomatic appointment passed upon at this time. Thus the Committee on Foreign Relations had practically a monopoly of the business transacted by the Senate within its field.

The special session commencing in September, 1814, offers three points of particular interest in the history of the committee. The first has to do with the manner of its choice. Madison's message, laying before Congress the facts of the military situation and the needs of the army, the navy, and the treasury, contained no suggestions on foreign relations which demanded the immediate attention of the Senate. Consequently the usual reference to a select committee of that part of the message which touched upon such relations hardly was in order, and at the beginning of the session no such committee was created.³⁶ On October 10th, however, the President communicated to Congress letters from the American peace envoys, and four days later submitted the instructions under which they were acting.³⁷ Whereupon the Senate passed a resolution that these documents, together with the several communications from the President since the beginning of the session, should be referred to a select committee. Bibb, Taylor, King, Brown, and Chase were chosen as the committee, and during the remainder of the session were usually referred to as the "Committee on Foreign Relations."³⁷ As such they were the organ of the Senate for the transaction of the same sort of business that had been assigned to

629, 630, 636, 639, 676, 706-727, 735, 738-739, 741, 764, 773; *Am. State Papers, For. Rel.*, III, 621-623, 964.

³⁶ Richardson, *Messages*, I, 547-551. The only parts of the message which were referred to select committees at this time were those concerning the militia, and military affairs. *Annals of Congress*, 1814-1815, III, 16.

³⁷ *Annals of Congress*, 1814-1815, III, 24, 27.

similar committees in years past.³⁸ Such a body might, perhaps, be described as a quasi-standing committee. It was not created as a standing committee, and, so far as the formal action of the house went, it was on the same basis as any select committee. But in everything but name it certainly possessed the characteristics of the standing committee, even to that of continuity of membership from session to session.³⁹

On the last day of the session Bibb's committee brought in a report which is of interest because it was the first of a type which frequently appears in the later history of the Committee on Foreign Relations. Soon after Congress had assembled, Madison had communicated to both houses correspondence which had passed between himself and Admiral Cochrane, in command of the British fleet on the American station, relative to the devastation which the British threatened to mete out to American coast towns in retaliation for wanton destruction alleged to have been committed by the American army in upper Canada.⁴⁰ The incident mentioned was the burning of York, which later was pointed to by the British as a justification for the destruction of the public buildings in Washington and other outrages of the same nature. The Senate referred the correspondence to the Committee on Foreign Relations, and just before adjournment the chairman of this body submitted a report giving the result of their inquiries, which, it was declared, manifested "to the world that the plea which had been advanced for the destruction of the American Capitol, and the plunder of private property" was without foundation.⁴¹ As an organ for the formulation of the opinion of the Senate upon matters concerning the foreign relations of the United States, the committee has produced some manifestoes which have

³⁸ *Ibid.*, pp. 24, 27, 164, 245-250, 260, 269, 270, 275, 278, 280, 294-297.

³⁹ Bibb, the chairman of this committee, and Taylor, Chase, and Brown had served on the Foreign Relations Committee of the preceding session. Also the committee had dropped back to five members, the size which it had had until the year before, when it had gone to seven. Rufus King was the only member of the new committee who had not served on its immediate predecessor, — and no man then in the Senate was possessed of more experience in the field of foreign relations than had King.

⁴⁰ Am. State Papers, For. Rel., III, 693-695.

⁴¹ Annals of Congress, 1814-1815, III, 294-296.

been of far-reaching importance in the history of the nation. Although its report on the "retaliating system" as practiced by Great Britain during the War of 1812 does not rank as an important state paper, yet it is worth noting because it is the first product of this sort of activity on the part of the committee.

The third significant event of the special session of 1814 was the use of the Committee on Foreign Relations in executive session in connection with the proceedings on the Treaty of Ghent. The incident occurred two days after the Senate had consented to the ratification of the treaty, when a motion to remove the injunction of secrecy from the proceedings and to print the documents connected therewith was referred to the "Committee on Foreign Relations."⁴² The reference marks the point at which this committee, after having come into being during a decade when no treaties were before the Senate, began to perform the functions which inevitably were to be assigned to it, and in the exercise of which it was to reach its greatest usefulness and power. Hitherto it had been a legislative committee; it had been used almost exclusively for the transaction of legislative business; no allusion to it is to be found in the executive journal. From this time on, its most important business was to be transacted in executive session, and every treaty laid before the Senate was to be considered by it.

At the beginning of the session of 1815 the usual reference of the several parts of the annual message was made, and it was not until a year later, December, 1816, that the Committee on Foreign Relations became the first standing committee of the United States Senate.⁴³ On the day following the reading of Madison's last annual address, Nathan Sanford of New York submitted thirteen resolutions, each referring a certain part of the message to a select committee, with leave to report by bill or otherwise. On the next day, however, Senator Barbour of Virginia introduced a resolution providing that it should be one of the rules of the Senate that eleven

⁴² Senate Executive Journal, III, 621.

⁴³ Annals of Congress, 1815-1816, pp. 19, 20. Committees were chosen to consider those parts of the message concerning foreign affairs, the militia, military affairs, naval affairs, finance and a uniform national currency, manufactures, roads and canals, and a national seminary of learning within the District of Columbia.

standing committees, which were named, should be appointed at each session. After discussion during several days, the resolution was passed on December 10th, the Committee on Foreign Relations heading the list. Three days later Barbour, Mason, King, Dana, and Lacock were chosen to be members of the committee.⁴⁴

Thus was established the Committee on Foreign Relations of the United States Senate. Along with the ten other committees made permanent at the same time, it had gradually come into existence during the decade and more of stress and strain which preceded the conclusion of the War of 1812. During the earlier years of the government, treaties and foreign affairs generally had been referred to select committees occasionally but in accordance with no particular rules of procedure. An increasing pressure of business, a pressure which became heavy during the war, demanded a greater efficiency of the Senate. The demand was met by a specialization of function — by the development of a system of standing committees which practically came into existence some time before it was formally made a part of the organization of the Senate. This specialization developed first in the field of foreign relations, and as at this time the business in this field was almost wholly legislative in its nature, the Committee on Foreign Relations developed as a legislative committee. With the consideration of the message and documents on the Treaty of Ghent its executive functions began, and it became the organ of the Senate for the transaction of executive as well as legislative business within the realm of foreign affairs.

RALSTON HAYDEN

⁴⁴ *Annals of Congress*, 1816-1817, pp. 18-22, 30, 32. The other committees named were those on finance, commerce and manufactures, military affairs, the militia, naval affairs, public lands, claims, the judiciary, the post office and post roads, and pensions. All of the members of this first Standing Committee on Foreign Relations were leaders in the Senate and in the nation. Barbour was a member continuously from 1816 until 1824, the last session before he left the Senate to become Secretary of War. He was chairman in 1816, 1817, 1820, 1822, 1823, and 1824. Nathaniel Mason was a member of the committee for twelve years, and was thrice chairman. Except for one session, Rufus King served from 1815 to 1823. S. W. Dana served only during the session of 1816, while Abner Lacock was a member for three years. King and Dana were the Federalist members.

EDITORIAL COMMENT

THE JOURNAL ENTERING UPON A SECOND DECADE

THE first number of the AMERICAN JOURNAL OF INTERNATIONAL LAW was issued in January, 1907, and with the issue of October, 1916, it completed what its friends are inclined to call the first decade of its usefulness. With the present number for January, 1917, the JOURNAL begins its second decade, which it is hoped will be one of even greater usefulness. In view of these circumstances, a few words concerning the JOURNAL will not be deemed inappropriate.

When the American Society of International Law was formed in 1906 it was the intention of the founders to create at one and the same time a journal as the organ of the Society, because at that time there was not in existence any other journal of international law in the English-speaking world. In 1906, in connection with the Lake Mohonk Conference on International Arbitration, the final steps were taken by a committee of the American Society of International Law to authorize the issuance of the JOURNAL as the organ of the Society, and the undersigned was appointed the editor and manager of the proposed publication, with power to appoint an editorial board. In all the preliminary arrangements, he associated with him Mr. Robert Lansing, one of the joint founders of the Society, and they made the arrangements for the appearance of the JOURNAL, determining its style and content. The JOURNAL has since then apparently found favor with the public and with its critical readers, for at the meeting of the Board of Editors, held in the City of New York on December 2, 1916, it was decided to make but one change, namely, to print the names of the members of the Editorial Board on the reverse of the table of contents so that the names of the persons responsible for the JOURNAL shall be more easily discovered than heretofore. This change followed naturally and logically the other change made last year, for when it was decided to have the editorial comments signed by their authors, editorial comment as such ceased and the comments

became notes, differing from the articles in that they were shorter and written by members of the Editorial Board. These are the only two changes which experience has suggested to the Board of Editors, and the JOURNAL, starting upon its second decade, will resemble in all other respects its predecessor of the first decade.

There is, however, another change which should be noted. The publisher for the first decade was Messrs. Baker, Voorhis & Company, of New York. The publisher of the series beginning with the January, 1917, number is the Oxford University Press, American Branch. In chronicling this change of publishers, it is proper to say, and it would be unjust not to mention it, that it is doubtful if the JOURNAL could have appeared when it did and in the form which it assumed had it not been for the interest taken in the venture by Messrs. Baker, Voorhis & Company, and for the generous terms, from which the element of profit was largely excluded, which they made with the Society for its publication. The Society and the JOURNAL owe Messrs. Baker, Voorhis & Company a debt of gratitude, and the officers of the Society and the Board of Editors of the JOURNAL consider it a pleasure, as well as a duty, to make this public statement of their indebtedness to their former publishers.

The undersigned is very happy to announce on behalf of the Society and the Board of Editors that an index of the first ten volumes of the publications of the Society will be issued in the course of the year, to consist of three separate indices in a special volume, one index to be devoted to the JOURNAL, another to the SUPPLEMENT, and the third to the PROCEEDINGS, so that the publications of the first decade will be readily at the disposal of readers who may care to consult them. The index will be sold to members and subscribers at cost, and it is not expected that the price will exceed the price of a single number of the JOURNAL, namely, \$1.25. The Editors would appreciate it, if orders for this index are placed in advance, so that they may know how many to have printed.

It should be stated that since January, 1912, the JOURNAL has appeared in Spanish, that it is steadily increasing its circulation and usefulness, and that the day does not appear to be far distant when it will be as frequently consulted in Spanish as it is in English, and exercise an additional influence among the Spanish-speaking as well as among the English-speaking countries.

JAMES BROWN SCOTT

THE RIGHTS OF THE CIVIL POPULATION IN TERRITORY
OCCUPIED BY A BELLIGERENT

THE generally recognized purpose of war is the overmastering of the armed forces of the enemy. The procedure employed to accomplish this result is, however, governed by certain restrictions which are called "the laws of war," for even in the effort to overcome an armed foe the principles of humanity are considered by all civilized peoples to have a binding authority. These principles and the specific application of them in the laws of war — customary or conventional — may not always be actually enforceable, even when solemnly accepted; but they remain the standards by which the conduct of nations is to be judged in the opinion of mankind and the verdict of history.

Civilization does not make war upon individual men, women, and children. Violence against helpless individuals is not war. It is persecution. In moments of calm deliberation all jurists agree in this; and the laws of war, therefore, by common accord, aim to secure the protection of the civil population of a country during military occupation by an enemy force.

The Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land have formulated the conclusions of those conferences on this subject, thereby creating a definite body of law. Exemptions from its operation on the part of the Powers that have ratified these conventions are to be found only in case of definite reservation at the time of signature or ratification, or under the restriction of Article 2, which confines the application of their provisions to the contracting Powers, and makes their obligations binding even upon these only if all the belligerents are parties to the convention.

Several of the belligerents in the present European War have failed to ratify the convention of 1907, which makes some advance upon that of 1899; but all of them ratified the convention of 1899; and it, therefore, expresses the obligations of all these Powers to one another, as well as their deliberately formed decisions as to the principles upon which the conduct of war on land should be based.

In stating the purpose of the convention, these principles are formulated thus:

Animated by the desire to serve . . . the interests of humanity and the ever increasing requirements of civilization;

Thinking it important, with this object, to revise the laws and general customs of war, either with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible;

Inspired by these views (the co-signatories)

Have, in this spirit, adopted a number of provisions, the object of which is to define and govern usages of war on land.

The provisions of Section III of the convention of 1899 relate to military authority over hostile territory. Here the primary assumption is that, while the territory is under the authority of the hostile army, this does not entirely supersede the civil authority; but, on the contrary, it "shall take all steps in its power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (Article 43).

Expressly prohibited are:

1. Compulsion of the population of occupied territory to take part in military operations against its own country (Article 44).

2. Pressure on the population of occupied territory to take the oath to the hostile Power (Article 45).

3. Disregard of "family honors and rights, individual lives and private property, as well as religious convictions," all of which must be "respected" (Article 46).

4. Pillage (Article 47).

5. The collection of taxes, dues, and tolls beyond the assessments already in force, except "for military necessities or the administration of such territory" (Articles 48 and 49).

6. Requisitions in kind or services from communes or inhabitants except "for the necessities of the army of occupation." "They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country" (Article 52).

In brief, the evident intention of the regulations is that the order and economy of civil life be disturbed as little as possible by the fact of military occupation; which is not directed against individuals or against society as an institution, but solely against armed resistance.

Into all the details of conduct on the part of an army of occupation it is obviously impossible for such regulations to enter. It would, in fact, be contrary to public morality to specify all the crimes and outrages that could be imagined in a catalogue of acts thus intended to be prohibited. It is, therefore, from the general principle of

respect for the civil rights of persons that the law regarding the treatment of the civil population in matters of detail is to be deduced; and it is with prevision of this necessity that the convention of 1899 says explicitly:

It has not, however, been possible to agree forthwith on provisions embracing all the circumstances which occur in practice.

On the other hand, it could not be intended by the high contracting parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders.

Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

In seeking for the law regarding the treatment of the civil population in territory occupied by a belligerent, we are not, therefore, confined to the formal regulations adopted in these conventions. Whatever is against the established usage of civilized nations, whatever infringes the laws of humanity, whatever violates the requirements of the public conscience, is as clearly illegal as if it were prohibited by precise definition.

Whatever the possibility of enforcement may be, this is the standard by which the jurist must form his judgment, and it is the standard by which public opinion in general must be governed.

At the present time the deportation of civil populations in great numbers from their homes and their forcible transportation to the country of the enemy, there to be compelled to the performance of servile tasks, furnishes an occasion for serious reflection.

In April, 1916, at Lille, the German military commandant issued a proclamation announcing the intention to transport the inhabitants to the country to perform agricultural labor. Each person was allowed to take 30 kilogrammes of baggage, including utensils and clothing. In one of the proclamations all the inhabitants of the house, with the exception of children under 14 years of age and their mothers and old men, were ordered to prepare for transportation within an hour and a half, with the injunction that "Whoever shall endeavor to avoid transportation will be pitilessly punished."

Against this measure the Mayor of Lille earnestly protested, as did also the Bishop of Lille, on the ground that "to destroy and

break up families, to wrench from their homes by thousands peaceable citizens, to force them to abandon their goods without protection, would be an act of a nature to arouse general reprobation."

On July 25, 1916, the French Government addressed an instruction to its diplomatic representatives in neutral countries directing them to acquaint the governments to which they were accredited with the conduct of the German military authorities at Lille, Turcoing, and Roubaix, and not only to call attention to the violation of the Hague Convention concerning the Laws and Customs of War on Land, but to appeal to the sentiments of justice and humanity of the neutral Powers and to the public opinion of all nations with a view to obtaining a remedy for these wrongs.

So far as is known, no action was taken upon this appeal by any government; but subsequently reported acts of deportation resulting, it is claimed, in the transportation to Germany of some 300,000 Belgians of both sexes and of various ages, not only forcing them from their homes but condemning them to conditions of alleged virtual slavery in a foreign land, have furnished occasion for a still more urgent appeal for friendly intervention by neutral governments.

Without assuming to judge of the accuracy of the complaints made, which touch most propoundly the provision of Article 46 for protecting the "family honors and rights" of the population in an occupied country, and without inquiring here into the reasons which may be given for such deportations, it does not admit of doubt that such acts as are reported are violations not only of the spirit but of the specified immunities of the convention of 1899, which all the belligerents in the present war have duly ratified.

Two practical considerations, therefore, seem to press themselves upon our attention at this time: first, the utter inutility of any international convention unless the co-signatories have the recognized right to inquire whether or not the obligations mutually created between them are in any case violated, and to insist that they be fulfilled; and, second, the evident impossibility of any really useful revision or extension of international law, when the conditions of peace favor such reconsideration, if no provision is made for the enforcement of regulations other than the force of the immediate victim of violation. Until it is recognized that failure to observe an international agreement is an offense against all the co-signatories, and not merely against the immediate sufferer, and also against the

very idea of law itself, and that, therefore, all who make the rule are responsible for its observance, it is a matter of relatively little consequence what the rules may be.

If this be a just conclusion, it remains to be considered on what ground any nation that denies the right of neutral co-signatories to inquire into alleged violations of a convention, or to remonstrate concerning them, protest against them, or insist upon conformity to the rules agreed upon, may, until these rights are conceded, justly claim a part in the formation of any future convention for the establishment of rules of law.

DAVID J. HILL

SUBMARINE REFLECTIONS

Norway alone of neutral Powers, so far as we are informed, has put the submarine in a class by itself in her treatment of both the military and merchant types. The former is debarred the passage of Norwegian waters except in case of necessity; the latter may approach only by day; both are forbidden to submerge within the state's territorial limits. Doubtless the position and character of the Norwegian coast line have exposed Norway to much annoyance in the performance of her neutral duties. Long, intricate, fringed with islands, near the scene of battle, blockade and visitation, sparsely settled, it cannot be adequately guarded or patrolled. That this difficulty should be increased by the approach and passage of U-boats submerged is unendurable; they must seek hospitality openly and undisguised. Granting this, however, is it just or reasonable to treat them differently from other vessels? While viewing Norway's action sympathetically, I would suggest that it lends sanction to the open or covert belligerent contention that the submarine is to be classed apart from other cruisers or other merchantmen and entitled to special treatment. Perhaps this claim is worth a brief examination.

Look first at what appears to be the German claim. Germany's U-boat campaign against Great Britain began with the declaration of a war zone and a so-called blockade. Now the first requisite of a valid blockade under the old system was that it must be effective, *i.e.*, so continuous, so strict, as to make the breach of it highly dangerous. The sporadic appearance of a submarine with an occasional chase or a semi-occasional capture does not answer this requirement. Again as our State Department has said over and over, to constitute

a valid capture, whether for breach of blockade, for carrying contraband or as enemy's property, cruiser warfare demands such stoppage, visit and search as will show nationality, destination and cargo. Moreover, the crew's and still more the passengers' lives must be safeguarded. The German practice of torpedoing without warning does not meet these requirements, and this Germany has admitted. And thirdly, in view of the extreme fragility of submarine construction, German policy demands that the old accepted usage of defensive armament for the merchantman be held illegal. Very likely timidity or nervousness arising from the consciousness that a touch of the prow or a single small calibre shell from a trader may end his ship's career, is responsible for a portion of the submarine captain's barbarities. On account of the U-boat's lack of carrying capacity also, the German practice is to sink a neutral ship carrying contraband which they may capture. Except for a few isolated and much protested instances in the Russo-Japanese War, this is a new, unjust, and cruel thing. In all these departures from the old law we see an inclination to change the rules to suit the peculiar nature of the submarine. As a cruiser, a ship of war, she must enjoy all the rights of a warship, but owing to her fragile build and other limitations, she must have privileges beyond those of a warship. This is not consistent.

Take now the British contention. U-boats are called pirates, which they are not even when they commit murder. At one time their captured crews were segregated as if for special treatment, until retaliation was threatened. On account of the U-boat menace, the blockading zone or line applied to the German coast, is wider far than any precedent warranted. This makes the old usage of a raised blockade and a new notification, in case of successful though temporary attack, quite inapplicable. Moreover, we gather that visit and search of a submarine merchant ship at British hands is highly improbable. In these cases too, though to a less degree, we see a tendency to change the rules to suit the peculiar nature of the submarine, to hold it to cruiser warfare rules but to claim special privileges against it.

This inclination to apply other than old rules to this new thing crops out even in our own case, for when the Bethlehem Steel Co. contemplated shipping submarines in parts, distributed if desired between several ships, the administration early in the war forbade its doing so as being not a mere trade in contraband. Barring this exception and

Norway's action, all neutrals appear to have regarded the U-boat as a cruiser with no other privileges and no other obligations than have been heretofore applicable to the cruiser. In judging of these inconsistencies, we may say, in the first place, that no party to a war can be allowed to determine the laws which shall govern it according to his own special interests. The law of nations has grown up out of the general agreement of many states, not through the insistence and self-interest of one. Again, and in view of the just mentioned principle, the presumption is in favor of the rules accepted prior to a war, for the simple reason that any change will be dictated by the desire and for the benefit of one, whereas all must be consulted. So introduced, a new usage does not become law, it is not law, it is merely the exercise of force.

By the close of the nineteenth century the neutral interest had become dominant; belligerency was regarded as a nuisance, almost an anachronism. It was, that is, an abnormal, exceptional status, with a presumption against any enlargement of its rights. In case of doubt, neutrality rather than belligerency was to be favored, in any new definition of the law. At the present moment, alas! the belligerent world is so powerful that neutrality has grave difficulty in asserting its rights. But this fact does not lessen those rights. If this is the theory with which we approach a study of the submarine status, I think there can be no doubt that the U-boat is to be regarded as a surface cruiser with no additional rights and privileges and with the same duties and liabilities. Hence in neutral waters it should not submerge. Submergence imperils neutrality by making the performance of neutral duties more arduous and the evasion of neutral rights easier.

THEODORE S. WOOLSEY

POLAND

From time to time statements have appeared in the press that a kingdom of Poland will emerge from the war. Sometimes it is the Czar of all the Russias who is to create Poland as an autonomous kingdom, presumably to be made up of Russian Poland, to which will be added Prussian and Austrian Poland. At other times, the press attributes to the Central European Powers the intention to establish a kingdom of Poland, and quite recently the statement has appeared in the press that the Central European Powers intend to create a

kingdom of Lithuania as well as a kingdom of Poland, apparently by depriving Russia of Lithuania and of its share of the partition of Poland, without the addition of Prussian and Austrian Poland. The proposal in each case seems to be an attempt to win over public opinion, which has always been very pronounced in favor of the Poles, and to gain the support of the Poles themselves, who are again to become a nation and a kingdom. But it is believed that the Poland of public opinion and of the Polish patriots is the unpartitioned Poland which, in 1682 under its king, John Sobieski, defeated the victorious and invading armies of Turkey under the very walls of Vienna, and saved a Christian Europe from Moslem aggression, only later to be partitioned by three of the Christian countries of Europe and among these the chief beneficiary of the victory of 1682.

Without going into details, it should be said that the ruler of Lithuania, then an independent country, married the Queen of Poland in 1568, and, by this marriage, the countries as well as their rulers became united. Poland was for centuries an unfortunate country — unfortunate internally because it was an elective monarchy, and subject to foreign intrigue and dictation in the matter of election, and unfortunate externally because its territory was coveted by three countries surrounding it and which, taking three bites to the cherry instead of the proverbial one bite, absorbed it, so that part of Poland went to Prussia, a part to Austria, and a part, forming the balance, to Russia, which three countries hold the land and its people in bondage.

Frederick the Great, on behalf of Prussia, and Catherine II, on behalf of Russia, concluded two treaties on the 4/15 of January, 1772, in the name of the Holy Trinity, an expression which the late Professor Jellinek of Heidelberg was accustomed to say was always used by Powers on the point of committing a peculiarly immoral agreement. By the first, they agreed to occupy and to annex certain Polish provinces, and by the second they determined conditions concerning the maintenance of auxiliary troops in case of attack. The reason assigned by the King of Prussia and the Empress of Russia was "the general confusion in which the republic of Poland exists by the dissension of its leading men and the perversity of all its citizens." Austria was not a party to this treaty, but it was the desire and the intention of the contracting parties that the Empress Maria Theresa should accede to it on the part of Austria. This Austria agreed to on February 19,

1772, and two treaties were entered into on July 25, 1772, between Russia and Austria, on the one hand, and Russia and Prussia, on the other, fixing the portions of Poland which each of the partitioning Powers should and actually did annex.

Poland lost by this action on the part of its neighbors about one-fifth of its population and one-fourth of its territory. The Empress of Austria was apparently loath to take part in the partition, but, when she made up her mind to join her imperial sister and her royal brother, she showed herself very exacting as to her share of the spoils, so exacting indeed that Frederick the Great said to the Austrian Ambassador: "Permit me to say, that your mistress has a very good appetite." This remark is equally applicable to all three of the sovereigns engaged in the partition of Poland, and the appetite, as the proverb says, "grows by what it feeds on."

Therefore, a second partition was agreed upon September 3, 1793, by which Poland was reduced to one-third of its original dominions with a population of some three and a half millions. In Lessing's *Minna von Barnhelm*, Just is not satisfied with the single glass. He wished a second, and, when the second was forthcoming, he added a proverb to the German language, upon which Austria, Russia and Prussia acted, that all good things are threefold.

Austria and Russia took the first step. Prussia, under the successor of Frederick the Great, acceded to the treaty of January 3, 1795, between Catherine of Russia and Maria Theresa's successor, and, in the treaty of the 10th of October, 1795, the balance of Poland was gobbled up.

Passing over the period of the French Revolution and of the Empire, the Congress of Vienna, which remade the map of Europe, took up the question of Poland and apportioned it among the three Powers. The Russian portion was erected into the kingdom of Poland under the sovereignty of Alexander, Czar of Russia. An insurrection of 1830 was put down by the Czar Nicholas, the successor of Alexander, and Russian Poland became a Russian province.

So the matter stands today. Prussia has its share; Austria-Hungary has its share, and Russia has its share.

Historians have given themselves much trouble to determine the sovereign who first proposed the partition. Carlyle, in his elaborate *Life of Frederick the Great*, thinks that the partition was doomed to happen, stating that

Two things, however, seem by this time tolerably clear, though not yet known in liberal circles: first, that the Partition of Poland was an event inevitable in Polish History; an operation of Almighty Providence and of the Eternal Laws of Nature; . . . and secondly, that Friedrich had nothing special to do with it, and, in the way of originating or causing it, nothing whatever. It is certain the demands of Eternal Justice must be fulfilled. . . . If the Laws and Judgments are verily those of God, there can be no clearer merit than that of pushing them forward, regardless of the barkings of Gazetteers and wayside dogs. . . . Friedrich, in regard to Poland, I cannot find to have had anything considerable either of merit or of demerit, in the moral point of view; but simply to have accepted and put in his pocket without criticism, what Providence sent.¹

The Prussian historian, Von Sybel, however, is of a different opinion. "The first official suggestion," he says, "came no doubt from Germany, but we are not to conclude that this was the cause of Poland's fall. If that suggestion had not been made, Poland would, it is true, have remained undivided, but would have fallen as a whole into Russia's hands."²

The question of priority is not important. The fact is that the three countries, Prussia, Russia and Austria, took part in the partition and they are therefore all guilty, and they are in the opinion of the undersigned equally guilty, for each of the participating Powers was a free agent and could and should have resisted the temptation to profit at the expense of a neighboring country, irrespective of the sovereign from whom the proposal first came.

There is a happy German saying, *Die Weltgeschichte ist das Weltgericht*, which may be freely rendered in English as "posterity is the ultimate court of appeal," and in this court the late William E. H. Lecky has pronounced the following judgment:

It is difficult to exaggerate the extent to which it shook the political system, lowered the public morals, and weakened the public law of Europe, for it was an example of strong Powers conspiring to plunder a feeble Power, with no more regard for honour, or honesty, or the mere decency of appearances than is shown by a burglar or a footpad.³

Will the great war of 1914 right the wrong of 1772, and shall we again see an independent, free and equal Poland, or are we to see a partial, autonomous kingdom at the expense of one or other or of all the partitioning Powers?

JAMES BROWN SCOTT

¹ Carlyle, *Life of Frederick the Great*, Vol. VI, pp. 481-482.

² Sybel's *History of the French Revolution*, English translation, Vol. II, p. 347.

³ Lecky, *History of England* (1906 ed.), Vol. VI, p. 81.

JURISDICTION APPURTENANT TO SHIPS OF WAR OVER THE HIGH SEAS

The present writer is in receipt of a communication from an honored and esteemed correspondent, a distinguished member of the faculty of a well-known French university, in which the utmost surprise is expressed at the "action — or rather the inaction of the American men-of-war when, off Nantucket, they suffered merchant ships to be sunk by the U-63 within the range of their guns." "It seems to me" (the French writer continues) "that there was there a violation of the rights and sovereignty of the United States. I state my opinion on this point of international law in a short note which you will find included herein."

The note, which was written in French, covered some five pages and began by a quotation from Baron Ferdinand de Cussy's work on *Phases et Causes célèbres du droit maritime des Nations*, t. 1, p. 250, as follows:

Par extension au principe de la souveraineté sur la mer territoriale, on peut dire que le droit de police et de protection appartenant au souverain du territoire baigné par la mer, lui appartient également dans l'atmosphère de ses bâtiments de guerre en pleine mer.

Un vaisseau qui navigue en pleine mer, le patrimoine commun de toutes les nations, ce vaisseau qui voyage à pleines voiles, emporte avec lui sur l'océan une souveraineté ambulatoire, momentanée, fugitive comme son passage, incontestable toutefois. Un vaisseau dans cette situation a même une sorte de territoire autour de lui, une atmosphère propre qui a pour mesure la portée de ses canons. Cela est si vrai que si un navire poursuivi par un autre se réfugie dans ce rayon, il sera à l'abri des poursuites de l'agresseur comme s'il était dans une rade et un port neutre. . . .

He says further that not merely when pursued by pirates, but by ships of a nation with which his sovereign is at war, if the fugitive encounters the warship of a neutral Power, all pursuit ought to cease from the moment the flying ship finds herself within the range of the neutral cannon, as if she had reached a neutral port. My honored correspondent expresses his approval of the above views quoted from De Cussy and says he can not understand how the commandant of a naval force can suffer, under his eyes and within range of his guns, acts of aggression upon an inoffensive merchant ship. He thinks such conduct on the part of the attacking ship but little friendly to the neutral Power because the attack is made as if the neutral Power were not represented. He says if he were walking in a solitary place,

and there saw a robust man armed with a club beating his wife or child, perhaps for serious cause, nevertheless the act would outrage him because it would wound his feelings of compassion, and that the aggressor, acting as if the observer were not present, wounds his dignity in appearing to consider him incapable of intervening to protect the victim of his brutality.

With deference, it is submitted that the above views, as to the part of the sea at any time covered by the guns of a neutral ship of war becoming for the time being neutral territory, like a neutral port, must be met by a like proposition, namely, that the high sea within range of the guns of a belligerent battleship becomes belligerent territory within which undoubtedly acts of war on the part of the belligerents are fully justified and cannot be restrained by the invasion of such belligerent territory by a neutral warship.

In the case mentioned, the German submarine was a vessel of war. The neutral and belligerent merchant ships were within range of her gun and torpedo fire when the American ships approached. It would be strange if the doctrine *prior in tempore potior in jure* were in this case reversed and the last comer had the complete right to displace and paralyze the powers of the belligerent ship of war in territory already subject to her control.

Laying this view aside, however, though it illustrates the difficulties of maintaining the views advanced, it is, again with deference, submitted that the doctrine of De Cussy, though supported by possibly a few French writers, has never found acceptance at the hands of the principal writers on maritime law or by the courts; that it is so little known as generally not even to be mentioned; that, if one may say so, it is highly fantastic and of impossible application, the jurisdiction varying with the greatly differing range of marine guns and with every movement of the ship. It seems to have its origin in certain confusions: a confusion as to the situation of a merchant ship sailing *under convoy*, when the battleship takes her under its protection, with the case of a ship, on the high seas, of another Power, which comes merely within the range of the guns of a neutral ship of war, the latter having in no way accepted the merchant ship as its charge or received it under its protection. A ship of war is no more a floating island of her own country on the high seas than is a merchant ship, save for certain allowed interference with the latter. Each is subject to the law of her own country and of no country but her own. Each is subject,

however, to international law. The difference is that a government ship retains this characteristic even in the territorial waters of another country. If all the attributes of territory belong to such floating islands, then a circle with a radius of three miles around even a merchant ship on the high seas is territorial water of her country with all the consequences that ensue. The fact that she has no guns makes no difference, since it has been fully held that the three-mile rule applies to an unfortified coast as much as to one bristling with batteries. Lord Stowell applied it to the mud-flat desert islands near the mouth of the Mississippi. The doctrine of three-mile or gun-range jurisdiction as to ships on the high seas must be classed as (I think) Gibbon classed the doctrine of transubstantiation, which he called "rhetoric turned into logic."

A case much in point, though not exactly similar, is the *Marianna Flora* (2 Wheaton 1), argued by Daniel Webster for the successful party and decided by the Supreme Court of the United States in 1826. The opinion is by Mr. Justice Story, perhaps the most learned in international and maritime law of all our justices. The *Marianna Flora*, a Portuguese ship from Bahia to Lisbon, on the high seas, mistook the United States armed schooner *Alligator*, commanded by Lieutenant Stockton, for a South American privateer or piratical cruiser. On the schooner approaching to observe and to determine her character, the Portuguese vessel fired on the United States ship. The latter replied by firing in return, overcame and compelled the *Flora* to surrender and brought her in for condemnation as a prize for a piratical attack on the United States ship. The *Flora* was ultimately released and a claim made against Lieutenant Stockton for damages for an unjustifiable approach and seizure and sending her in without any reasonable cause. The court says in considering the points raised:

It is necessary to ascertain, what are the rights and duties of armed, and other ships, navigating the ocean, in time of peace. . . .

It has been argued, that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach. This doctrine appears to us novel, and is not supported by any authority. *It goes to establish upon the ocean a territorial jurisdiction*, like that which is claimed by all nations, within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and PER-

MANENT appropriation, and has never been successfully asserted beyond it. Every vessel, undoubtedly, has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized and we see no reason for admitting its existence.

Lieutenant Stockton was held guilty of no fault and not subject to pay damages.

Rear Admiral Stockton in his *Outlines of International Law*, falls into error in saying (p. 156) "The *Marianna Flora* was a small Portuguese vessel of war." It appears that she was, on the other hand, an armed merchant ship with a valuable cargo. Justice Story (p. 50) in the opinion states that "she was a merchant ship bound on a lawful voyage, and not a piratical cruiser." The language of the decision is broad enough to cover ships of all sorts, however, and expressly covers armed ships. The case is cited here as strongly repudiating the theory of any right or jurisdiction over the high seas for a cannon shot from a vessel similar to that pertaining to land over the littoral seas, or for any distance beyond that required for her own movements. Mr. John Bassett Moore in his invaluable digest (Vol. 1, p. 700) cites the case in support of this statement: "The rule of territorial waters is inapplicable to ships on the high seas."

The Chargé d'Affaires of Portugal requested the immediate discharge of the ship, and Mr. Adams, Secretary of State, instructed the District Attorney that the President desired her restoration "upon terms as easy and indulgent as might be compatible with law."

The extended index of Calvo's *Droit International* as to ships and jurisdiction with respect to them has been examined but no recognition of the doctrine claimed has been found, yet Calvo is a writer most comprehensive and most hospitable to the ideas of many nations. Neither has it been found recognized in our own or English treatises examined. The added fact that in 1907 at The Hague the representatives of the nations of the world extensively codified maritime international law, and the representatives of the maritime Powers at London in 1909 in the Declaration of London more minutely and extensively carried on such codification, and that neither assembly recognized in any degree the doctrine of De Cussy, is the highest proof that it has not found acceptance and become a part of the law of the sea.

The suggestion that a neutral warship seeing a belligerent warship sink a merchantman of another nationality on the high seas without

seeking to protect the merchant ship, is conducting itself like a strong man who in a lonely place sees a violent assault on women and children without intervening, cannot be agreed to. Such assault appears on its face felonious; that of the warship appears on its face to be the lawful exercise of a belligerent right. However painful to witness it may be, the neutral bystander has no right to intervene any more than to interfere with the lawful, though distressing, exercise of force by a police or sheriff-officer.

In a fierce, destructive war, involving every first-class Power except the United States, when the most well-established neutral rights are invaded, minimized and denied, it is submitted that our country is not called on to apologize for failure to assert such shadowy, unestablished, contentious, and it is believed, repudiated claims to jurisdiction over the high seas as these advanced by De Cussy.

The views here expressed have met with the approval of a considerable number of naval officers of high rank and special knowledge, who were consulted, and of various students of international law. Not one of these gentlemen doubted or denied them.

CHARLES NOBLE GREGORY

SUBMARINES AND INNOCENT PASSAGE

The activity of the German U-boat 53 by its entrance into the harbor of Newport, its short stay there, and its departure for the open sea, followed within a few hours by its destruction of several enemy and neutral merchant vessels outside the three-mile limit, raises important questions concerning the rights and duties of a neutral Power over its territorial waters. The first concerns the doctrine of "innocent passage"; the second, the question of "due diligence"; the third, the extension of territorial jurisdiction in time of war beyond the traditional limit of a marine league.

The doctrine of "innocent passage" is in a way a working compromise between the right of a littoral state to jurisdiction over the marginal sea and the right of maritime powers to make use of the high seas as a universal highway of commerce and navigation. The purpose of such territorial jurisdiction is both strategic and economic. Its extent, despite the extravagant claims of the sixteenth and seventeenth centuries, came to be limited theoretically by the power of the

littoral state exerted from the shore. As was said by Sir Thomas Barclay in his report at the meeting of the Institute of International Law of 1894, held at Paris:

Do not let us forget that the distance of a cannon-shot from the coast is a fiction and has never been anything but a fiction. It is the invention of Bynkershoek, who found in it a formula by which the various and more or less exaggerated claims might be reduced to a common and reasonable limit.¹

"The smallest distance, I believe," wrote Jefferson to Hammond and Genêt, November 8, 1793,² "claimed by any nation whatever, is *the utmost range of a cannon-ball, usually stated at one sea league.*"

This marine league, set forth as the minimum of jurisdictional extent, is generally regarded as its maximum, notwithstanding the fact that the development of ordnance has multiplied the range of guns many times since Jefferson wrote. While the doctrine has its basis in strategic protection to the littoral state, experience has demonstrated its necessity for the conservation of national marine resources and, furthermore, that such conservation is not always possible when the jurisdiction of the littoral state ends at the arbitrary distance of three miles. This thesis has been admirably sustained by Professor T. W. Fulton in his learned and exhaustive treatise entitled *The Sovereignty of the Sea.*³ In this respect international practice has acquiesced in certain extensions of the three-mile limit. The strategic practice is, however, upon a different if not more ancient footing. While logically the extent of the marginal sea should vary with the increase of the power of ordnance, there is no likelihood that the established observations of more than a century would permit any general extension, notwithstanding the resolution of the Institute of International Law in 1894, a part of which was as follows:

The Institute, considering that there is no basis for limiting in a single zone the distance necessary for the exercise of sovereignty and for the protection of coast fisheries and that which is necessary in order to guarantee the neutrality of non-belligerents in time of war,

¹ *Annuaire de l'Institut de Droit International*, XIII, 127.

² Moore, *International Law Digest*, I, 702.

³ *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters: with special reference to the Rights of Fishing and the Naval Salute.* By Thomas Wemyss Fulton, Lecturer on the Scientific Study of Fishery Problems, the University of Aberdeen. William Blackwood and Sons, Edinburgh and London, 1911.

That the distance usually adopted of three miles from low-water mark has been recognized as insufficient for the protection of shore fisheries,

That this distance no longer corresponds to the actual range of cannon from the shore, has adopted the following dispositions:

Article I. The state has the right of sovereignty over a sea zone which bathes the coast, subject to the right of innocent passage reserved in Article V. This zone carries the name of territorial sea.

Article II. The territorial sea extends to six marine miles (sixty to a degree of latitude) from low-water mark over the whole extent of the coast.¹

The littoral state must generally content itself with making its jurisdiction effective over the marginal seas within the traditional three-mile limit, and it thus becomes necessary to scrutinize all acts proceeding from the right of innocent passage from the standpoint of the security of the state. This security is of two kinds: first, the direct protection of the coast-line, ports, and waters from violation or evasion of the municipal laws of the littoral state regarding customs, quarantine, and the safety of navigation, in peace as well as in war; and second, the indirect security which demands the performance of the positive duties of neutrality.

So far as submarine navigation is concerned, these questions are practically limited to times of war, for while the submarine might, like the aeroplane, be a tolerably effective smuggling instrumentality in time of peace, no one conceives that the peaceful oceanic navigation of the future, any more than in the past, will be other than surface navigation. It is only in time of war, therefore, that the question is apt to become one of prime importance. The dramatic exploits of the *Deutschland*, for example, have little significance for the development of navigation in time of peace, and the notoriety of them at the present time is not so much for the purpose of demonstrating the possibility of the submarine as a merchandise carrier, as to give to that type of vessel a legal status as a possible merchantman, adding another element of difficulty to the whole U-boat problem and thereby making confusion worse confounded. If the submarine has such a status, and neutral goods are shipped thereon, all the dominant questions of visitation and search and of the capture of merchantmen are raised. It is not the vessel's submarine qualities which give it a merchantman status, but its compliance with the test of a merchant-

¹ *Annuaire de l'Institut de Droit International*, XIII, 329; Resolutions of the Institute of International Law, English translation, New York: Oxford University Press (American Branch). 1916. p. 113.

man and its ability to conform to the navigation laws of the country whose waters it seeks to enter. These laws are universally framed upon the theory of surface navigation. If, therefore, a submarine, assuming a merchantman status, enters the territorial waters of a foreign state in time of peace or war, that state may properly require of it that it remain upon the surface while and as long as it is in such waters, so that it may conform to the accepted standards of safety to navigation. The littoral state has the right and the duty to protect its territorial waters from dangerous usages — and any navigation below the surface of the water is, at least at the present time, such a usage, as was shown by the refusal of the *Deutschland* to take on a pilot and its collision with a tug off New London with consequent loss of life.

The United States has minute regulations for the navigation of its territorial waters. A motor-boat of sixteen-foot length must be provided with starboard and port lights and be otherwise equipped in the interest of safety. That a state would be within its rights in requiring surface-navigation of its territorial waters in time of peace is unquestioned. Obedience to such requirements would be the duty of all vessels, national or foreign, public as well as private. As to this the Institute of International Law, at the same Paris meeting, laid down the following proposition:

Ships traversing territorial waters must conform to special regulations of the littoral state in the interest and for the security of navigation and maritime police.

More important, however, for the present purpose is the question of the indirect security of a littoral state during war because of the positive duties of neutrality. "Innocent passage" of belligerent cruisers through neutral waters is not a fancy nor an abstraction. The gist of the idea is that any activity having immediate strategic value by a belligerent warship in territorial waters compromises the neutrality of the littoral state. This is the underlying principle which controls all the questions involving entry into and departure from neutral ports. The "line of respect" does not rest upon the same basis as does the line of jurisdiction over the territorial sea for the purposes of commerce, navigation, and fisheries. While it has its origin in the right of the littoral state to be secure from belligerent acts directly endangering its coasts and coastwise shipping, with the development of the doctrine of positive neutral duties it has come to

include an area within which no belligerent acts of strategic purpose are to occur and within which the neutral state is bound to see that none takes place.

It is in this connection that the doctrine of innocent passage requires consideration. A further resolution adopted by the Institute of International Law in 1895 stated:

All vessels without distinction have the right of innocent passage through the territorial sea, reserving to belligerents the right to regulate, and, for the purposes of defense, to bar the passage of all vessels from such waters, and reserving to neutrals the right to regulate the passage within such waters of the warships of all nationalities.

In other words, it is for the neutral littoral state to decide as to what constitutes innocent passage in time of war with reference to belligerent warships. It will be noted that the Institute decided that such regulations might be made either at the outbreak of war, in the declaration of neutrality, or during the progress of the war by special regulations. Attention is called to this distinction to meet the objection sometimes raised that any change in the policy of a neutral toward belligerents during war is a violation of neutral duties.

To be innocent, the passage is not merely to be innocuous so far as the littoral's immediate property interests, or the property interests of its nationals, are concerned, but inoffensive in the sense that it does not compromise the positive neutrality of the littoral state. As a neutral state is bound not to suffer or permit one belligerent to make use of its ports or waters as the base of naval operations against another belligerent, its positive duties become more onerous and exacting with the development of every new instrument of maritime warfare. A measure of precaution sufficient to prevent sailing vessels from making use of territorial waters as a base was not a sufficient standard for the treatment by a neutral of belligerent steam iron-clads. What is enough to prevent surface operating steam vessels from making territorial waters a base may not be a sufficient standard when submarines are involved. In each case the neutral state is bound to reëxamine the question of innocent passage and to regulate the use of its waters accordingly.

New neutral duties growing out of submarine navigation were implied by the notes of the Allies to the neutral Powers in August last. A memorandum from the French Embassy to the Department of State, dated August 29, 1916, warned neutrals against allowing

belligerent submarines, regardless of their use (i.e., either "merchant" or war submarines), to avail themselves of neutral waters roadsteads and harbors:

In the case of submarines the application of the principles of international law offers features that are as peculiar as they are novel, by reason, on the one hand, of the facility possessed by such craft to navigate and sojourn in the seas while submerged and thus escape any supervision or surveillance, and, on the other hand, of the impossibility to identify them and determine their national character, whether neutral or belligerent, combatant or innocent, and to put out of consideration the power to do injury that is inherent in their very nature.

It may be said, lastly, that any submarine war vessel far away from its base, having at its disposal a place where it can rest and replenish its supplies, is afforded, by mere rest obtained, so many additional facilities that the advantages it derives therefrom turn that place into a veritable basis of naval operations.

Therefore the Allied Governments held that all submarines should be excluded from neutral waters or, having entered them, they should be interned.

The United States declined to accede to any such sweeping general doctrine, but stated that

So far as the treatment of either war or merchant submarines in American waters is concerned, the Government of the United States reserves its liberty of action in all respects and will treat such vessels as, in its opinion, becomes the action of a Power which may be said to have taken the first steps toward establishing the principles of neutrality and which for over a century has maintained those principles in the traditional spirit and with the high sense of impartiality in which they were conceived.

Since then the German U-boat 53 has followed the *Deutschland* to American waters with results known to all the world.

Norway took an essentially different position in answer to the memorandum of the Allies. It declared that it had the right to prohibit submarines designed for war purposes and belonging to belligerents from passing through Norwegian territorial waters (i.e. to a distance of four miles) or sojourning in them, but that it did not conceive it to be its duty as a neutral absolutely to interdict such passage and sojourn. The right to regulate such passage being included in the larger right, the Norwegian Government by a royal decree, dated October 13 last, "forbade belligerent submarines to traverse Norwegian waters except in case of emergency, when they must remain upon the surface and fly the national flag." Merchant submarines are by the same decree to be allowed in Norwegian waters

only in a surface position in full daylight and when flying the national colors. Whether or not Norway can enforce this decree is problematical, not because of the questions of law involved, but because the belligerent most affected may be able to use force against Norway, a relatively weak Power.

So far the exploit of the U-53 is a unique incident. It is to be hoped that it will remain so. Its repetition might go far toward compromising the neutrality of the United States. As a single incident, it forcibly emphasizes the wisdom of the resolution adopted by the Institute of International Law at the same session Article IV:

In case of war the neutral littoral state has the right by the declaration of neutrality or by *special notification* to fix its neutral zone beyond six miles to the range of a cannon-shot from its shores.

Absolutely to interdict under-surface navigation in territorial waters by all foreign submarines in war or peace, and to insist upon "innocent passage" that is really innocent in coastal waters as far from the coast as the range of the most modern ordnance, would go far toward preventing the waters adjacent to the neutral being made a base of belligerent maritime operations. It would render difficult submarine operations begun by submerging in coastal waters and consummated in the open sea *dum ferveret opus*.

J. S. REEVES

SAFE CONDUCT FOR ENEMY DIPLOMATIC AGENTS

On September 8, 1915, the Secretary of State requested the recall of the Austrian Ambassador because of his proposed plans to instigate strikes in American manufacturing plants engaged in the production of munitions of war. The request was complied with, and on October 5, 1915, Dr. Dumba left the United States, the Department of State securing for him a safe-conduct. Count Adam Tarnowski von Tarnow, after an interval of some thirteen months, has been appointed Austrian Ambassador to the United States, and just as his predecessor wished a safe-conduct to return to his native land, he was apparently anxious to receive a safe-conduct for himself and his suite from the shores of Europe to Washington. About the middle of November the United States informed Great Britain and France that Count Tarnowski had been appointed Ambassador to the United States and the question of a safe-conduct for the Austrian

Ambassador and his suite was broached. Shortly before the end of November Great Britain and France are understood — for the correspondence has not been published — to have expressed an unwillingness to furnish the Ambassador and his suite with a safe-conduct, and, leaving aside the question whether international law permits a belligerent to take an ambassador of the enemy destined to a neutral country from the vessel upon which he is proceeding on the high seas to his post, the Allies are reported to have contended that the activity of diplomatic agents of the enemy in the United States was such that they did not care to facilitate their arrival in the United States; that by the purchase of supplies and of contraband in the neutral country they injured the Allies, and by their activity in general in the United States they rendered services to the enemy country which it was the right and the duty of the Allies to prevent if they could; and that they could not be expected to aid the Ambassador and his suite to reach the United States, even if they did not remove him from the vessel on which he was traveling.

The United States, it is understood, protested against this attitude of the Allied Governments on the ground that it has a right to maintain diplomatic relations with any and every country according to its pleasure; that the Allied Powers should recognize this right and should not throw obstacles in the way of its realization; and that the United States expected the Allied Governments to reconsider their action and to assure it that Count Tarnowski and his suite would not be molested during his passage from Europe to the United States to take up the duties of his post.

On December 15th, as the JOURNAL goes to press, a statement appears in the newspapers that the Allied Governments have reversed their original attitude, apparently out of courtesy and as a mark of their respect for the United States.

The question is apparently simple in principle, although it appears to be somewhat embarrassing in practice. Count Tarnowski was not asking permission to pass through belligerent countries to his neutral post. This would have raised the question squarely whether the belligerent was bound out of courtesy and respect to the neutral to allow the diplomatic agent of the enemy to pass through its territory. Count Tarnowski was endeavoring to reach his post by way of the high seas, which cannot be regarded, today at least, as the patrimony of any one country. Upon a neutral vessel he should be immune

from seizure and capture, although the reasons advanced by the Allies for refusing to grant a safe-conduct are not without weight. If the diplomatic agent of the enemy is protected upon a neutral vessel from seizure, it is not to be presumed that the Allied Governments would seek to remove him from the vessel, even although they might be unwilling to grant him a safe-conduct. The mere failure to do so does not mean that the Allies questioned his immunity, but rather that they were unwilling to further his voyage by any act on their part.

Nations are long-lived and they should have long memories. The Allied Powers should recollect their attitude when Messrs. Mason and Slidell, civil, not military, commissioners of the Confederate States of America, were removed from the British packet *Trent*, on its voyage to England in 1861, by Captain Charles Wilkes in command of the American man-of-war, the *San Jacinto*. Great Britain protested against this action on the part of the American authorities as contrary to international law, and the French Government, considering it a violation of the rights of neutrals and threatening neutral rights in general, also protested against the action of the United States. Russia, it is understood, protested informally but none the less energetically.

If it was wrong for a belligerent in 1861 to remove enemy agents from a neutral vessel, on their way to a neutral country, it would be wrong in 1916 so to do, unless international law has changed in this respect, and the law has not, it is believed, been changed either by practice or by convention. It was apparently in the interest of the United States to prevent Messrs. Mason and Slidell from reaching Europe in order to act in behalf of the Confederate States, and therefore Captain Wilkes removed them from the *Trent*. It is apparently in the interest of the Allied Powers not to facilitate the journey of Count Tarnowski and his suite to the United States, and therefore they refused a safe-conduct. The United States, because of the British protest and the protests of neutral Powers, released Messrs. Mason and Slidell. The Allied Governments, as a courtesy and out of respect for the United States, have either granted a safe-conduct to the Austrian Ambassador and his suite or have assured the United States that they will not be molested. The fact is the United States was wrong in 1861 and the Allied Powers were short-sighted in 1916.

JAMES BROWN SCOTT

COSTA RICA *v.* NICARAGUA

The decision of the Central American Court of Justice concerning the complaint of the Republic of Costa Rica against the Republic of Nicaragua rendered on September 30, 1916, is of singular interest from the point of view of international law.

A restatement of the facts in the case is perhaps not required in view of the editorial on the subject in the April number of this Journal, 1916, page 344. The main question at issue was the right of Nicaragua to negotiate and enter into agreements with the United States concerning matters of direct or indirect interest to the other Republics of Central America. The complaint of Costa Rica was not based on international law, but on the alleged violation of her rights to be consulted by Nicaragua in any negotiations affecting Costa Rican interests, as determined by the Cañas-Jerez Treaty of 1858, and the arbitral award of President Cleveland, of 1888, interpreting that treaty. Costa Rica specifically protested against the Bryan-Chamorro Treaty between Nicaragua and the United States, of August 5, 1914, granting the latter the exclusive right to construct a canal across Nicaragua, a naval base in the Gulf of Fonseca, and ceding Great Corn Island and Little Corn Island in the Caribbean. As a co-riparian state on the San Juan River, Costa Rica claimed the right under the Cañas-Jerez Treaty to be consulted in any negotiations affecting the appropriation of its waters for the purposes of an interoceanic canal. It was asserted that the Bryan-Chamorro Treaty constituted, not the cession of an option on the canal, but an actual sale of ownership rights. Costa Rica further claimed that the rights of commerce and navigation mutually granted by the Republics of Central America for the period of ten years under the Washington Convention of 1907, effectually incapacitated Nicaragua from making any cessions which might endanger these rights. This rather extreme claim virtually amounted to the assertion of a commercial servitude.

The decision of the Central American Court of Justice — the representative of Nicaragua, Judge Navas, alone dissenting — completely sustained the main contentions of Costa Rica. On the principle *res inter alios acta alteri nocere non debet* the court held that Nicaragua was legally incapacitated from entering into the Bryan-Chamorro agreement. In view of the fact that the United States was not subject to the jurisdiction of the court, it expressly refused to

declare this treaty null and void. Such a conclusion, however, is the unavoidable inference of this decision which, as regards the United States, amounts to something more than a mere *caveat emptor*.

The United States, in the light of this decision, finds itself therefore in the embarrassing situation of having become party to a contract made in apparent violation of the rights of Costa Rica as clearly defined by President Cleveland in his award of 1888. The United States Senate evidently sensed the anomalous aspects of this situation in accompanying its consent to the ratification of the Bryan-Chamorro Treaty with the following resolution dated February 18, 1916:

Provided, That whereas Costa Rica, Salvador, and Honduras have protested against the ratification of said convention in the fear or belief that said convention might in some respect impair existing rights of said states, therefore it is declared by the Senate that in advising and consenting to the ratification of the said convention as amended, such advice and consent are given with the understanding to be expressed as part of the instrument of ratification that nothing in said convention is intended to affect any existing rights of any of the said named states.

In commenting on this resolution, the Court pertinently observes that: "The intention here indicated is most noble and of high importance, since it establishes an obligation on the United States, but it is without efficacy in so far as it deals with the legal relations between the nations in litigation. . . ." The suggestion has been privately brought forward that the United States should in turn submit to arbitration the question of the validity of the Bryan-Chamorro Treaty.

Though the decision deals primarily with questions of treaty interpretation, it involves also questions of international law of more than ordinary interest. Incidentally, it should be noted that Nicaragua denied the competency of the court to hear the case on the ground that it could not adjudicate concerning questions arising prior to its establishment in 1907. Nicaragua also argued that:

As sole sovereign over the territory in which said canal was to be constructed, and as absolute owner of the benefits that she might derive in compensation for the favors and privileges to be conceded by her government, she would not permit them to be made the subject of judicial determination, since the award [President Cleveland's], by its very nature, is not subject to revision or interpretation by any arbitral tribunal.

This was equivalent to saying, of course, that the Nicaraguan interpretation of the award was the only correct interpretation.

Arguing that the Bryan-Chamorro Treaty did not constitute a sale, but merely an option for the construction of a canal, Nicaragua denied the right of Costa Rica to present any formal complaint until there should have been an actual violation of her rights. In other words, there is no international right of injunction, of friendly warning, or *caveat* to prevent an anticipated injury. Such an argument, though also used by Secretary Knox in his otherwise extremely able reply to the original representations of Great Britain concerning the Panama Tolls Act, finds little support either in the light of reason or practice.

The Nicaraguan Government, holding views of this character, declined to present its case before the Court at Cartago. Its interests, however, were represented by Judge Navas, the Nicaraguan member of the tribunal. In acknowledging the court's notification, the Government of Nicaragua protested against the decision and declared that it was not disposed to abide by it. (See reply of the Court to Nicaragua's protest, printed in Supplement to this Journal, p. 5.)

The most significant point of international law raised by this whole controversy is the right of a state in its sovereign capacity to negotiate as a free agent with another sovereign state concerning matters of vital interest to other neighboring states. Costa Rica was the sole complainant in this case; but the other Republics of Central America are likewise interested. Any act by one of these states giving to the United States special privileges in Central America is of obvious concern to the remaining states. This becomes most apparent in the special provision of the Bryan-Chamorro Treaty for the cession to the United States of a naval base on the Gulf of Fonseca, where the maritime limits of Nicaragua, Honduras, and Salvador meet and blend. The available deep-water anchorage in these waters is very restricted, and all three republics consequently have a common interest in their use and control. Moreover, the size and formation of the gulf is such that any naval base within its limits would necessarily control the whole body of water.

It is true that the question of the cession of the naval base was barely touched upon by the Court at Cartago. It was ably presented, however, by Mr. Salvador Rodriguez Gonzalez in an article entitled "The Neutrality of Honduras and the Question of the Gulf of Fonseca" which appeared in the July issue of this Journal, 1916, page

509. The interest of Salvador and Honduras as sovereign states in any transfer of maritime jurisdiction in the Gulf of Fonseca was fully demonstrated. It was furthermore claimed that the neutrality of Honduras which was proclaimed and guaranteed by the Washington Conventions of 1907, to which the United States was morally bound, effectually forbade the cession of a naval base in waters held practically in common by Honduras, Nicaragua, and Salvador, and accordingly neutralized to all intents and purposes.

Without attempting to weigh these arguments, we may emphasize, however, the significance of the fundamental question at issue, namely, the freedom of a state as a sovereign entity, what the French publicists term *l'autonomie de la volonté*. The United States has not hesitated to deny the sovereign right of another state to dispose of its territory in such a way as to menace American interests. This was conspicuously shown in the Senate resolution of July, 1912, concerning Magdalena Bay. (See editorial in this Journal, October, 1912 (Vol. 6), p. 937.) On the other hand, the United States, in its dealings with certain countries, notably the former Kingdom of Hawaii, and the other nations of this continent, has recognized the existence of neighborhood interests which permit, and even require, mutual considerations and privileges not due more remote nations. This has been particularly true in Central America, where the five republics have in many practical ways recognized the close identity of their interests.

When, therefore, in such a controversy as that raised by the Bryan-Chamorro Treaty, we are faced by the claims of absolute sovereignty, it would seem as if we had the choice of two alternatives. We must, on the one hand, recognize the shock and the irreconcilable claims of contending sovereignties. On the other hand, we must recognize the necessity of at least a partial surrender of the claims of absolute sovereignty. The former alternative does not conduce to international peace and order. The latter would seem to offer the only hopeful solution of the antagonisms and contentions of nations. In other words, the theory of sovereignty is found to be unworkable: it constitutes a positive menace to the great constructive task of regulating the peaceful relations of nations. We need to recognize, in place of the archaic theory of sovereignty, the great principle, the fundamental reality of the mutual dependence, the common interests of the nations of the world.

Whatever may be the ultimate issue of the particular controversy raised by the treaty under discussion, we may be confident that the United States, in its championship of generous, progressive principles in international affairs, will not fail to stand always for a liberal interpretation and development of the law of nations on this continent.

PHILIP MARSHALL BROWN

THE RIGHT TO ATTACK UNARMED SUBMARINE MERCHANTMEN

THE arrival at Baltimore, in July last, of the *S. S. Deutschland*, an unarmed submarine merchantman, with a valuable cargo for sale in the United States, and the subsequent departure of the vessel from that port for Bremen, raised inquiry whether principles established for the regulation of attacks upon surface craft of a belligerent could be applied with equal justice with respect to merchantmen capable of taking refuge within the depths of the sea.

The unarmed submersible merchantman, like that which is obliged to remain on the surface, obviously cannot open fire upon an enemy ship. It serves also a useful purpose as a carrier of persons and property. It is unique, however, with respect to its mode of and facility in eluding pursuit as well as signals to surrender. It may be doubted whether this circumstance alone suffices to place the submarine in a less favorable position. A surface craft of extraordinary speed, enabling it to outdistance every pursuer and to keep beyond the range of signals, would not for that sole reason be exposed to attack at sight. Refusal to obey a reasonable signal to come to should doubtless subject an undersea vessel to the same penalties as a surface craft. The peculiar ability of the former to disregard such a signal with impunity does not, however, justify the failure to make one, unless it can be shown that the right of capture is an absolute one unfettered by the dictates of humanity. Such is not the case in the normal situation where the merchantman is not primarily devoted to the public service, or until guilty of reprehensible conduct.

At the present time an unarmed enemy surface craft, such as a trans-Atlantic liner, of great tonnage and high speed, although designed and employed primarily for the transportation of passengers and mail, is still capable of rendering incidentally substantial military service as a carrier of war material. Its speed may enable the vessel to outdistance any pursuer and to keep beyond range of a

signal to lie to. Wireless telegraphic equipment may offer means of summoning aid whenever needed. The instant destruction of the ship without warning may thus offer the sole means of preventing its escape and the delivery of contraband articles at their destination. Doubtless the success of the voyage, despite its principal purpose, serves to prolong the war by adding to the resources of the state to which the vessel belongs. It is not believed, however, that the indirect harm to be wrought in consequence of escape equals that to be anticipated from the deliberate destruction of the lives of the occupants of the ship by an opposing war vessel. Claims of military necessity fail to turn the scales of justice.

The submersible merchantman when observed on the surface, if its harmless character is then ascertainable, would seem to be entitled to such a warning as it might justly claim if it could not submerge. Greater excuse for attack at sight may exist when an enemy warship upon first encountering a submarine is in fact unable to distinguish it from an armed undersea vessel known to be employed as a weapon of offense. To remove occasion for such mistakes, it is believed that the unarmed submersible should undertake the burden of exhibiting some distinctive token or proof of its peaceful character, which by general convention maritime Powers should agree both to respect and refrain from abusing.

It may be urged that the sheer ability of a craft to submerge betokens such special adaptability for engagement in hostile operations that the military necessity to the enemy to destroy or capture it should be recognized as paramount to every other consideration. The treatment of surface craft affords perhaps a parallel. An unarmed passenger liner, built with special reference to its use in time of war as a transport or as a scout cruiser, with decks constructed so as to admit of the easy addition of armament, does not lose its quality as a merchantman, if designed primarily as a carrier of persons and property, and while employed in fact as a vehicle of commerce. To justify attack at sight upon an unarmed submarine merchantman, the fact should be known, not merely that the vessel is readily capable of transformation in port into a warship, but also that it is either designed primarily for use as such, or that when encountered it is a direct participant in the prosecution of the war.

CHARLES CHENEY HYDE

PROPERTY IN NAVAL CAPTURES

There is so much confusion in the public mind as to procedure in prize cases that it seems advisable, without, however, entering into details, to offer some observations on the subject of a kind calculated to put it in its true light.

The law of nations allows enemy property upon the high seas to be taken wherever found. A man-of-war or a public vessel, unless it be engaged in scientific pursuits, is liable to capture. Private property of the enemy, that is to say, property on the high seas owned by citizens or subjects of the enemy, may likewise be captured; and the neutral property of neutral citizens or subjects directed to a blockaded port or of the kind known as contraband in voyage to a neutral port from which it may be transferred to the enemy, is liable to capture under certain conditions.

Now, there is a very essential difference between these different cases. The enemy man-of-war or public vessel may be captured, and it is not necessary, so far as the question of title is concerned, to pass it before a prize court of the captor, because the capture of enemy property passes title. Municipal statute may indeed require for certain purposes that the capture may be passed upon by a prize court, but this is a purely municipal, not an international, regulation, in order to entitle the captors, according to the municipal law of most countries, to share in the prize. In the case of a man-of-war or of a public vessel, neutral interests are not involved.

The case, however, is different when property belonging to private owners is captured, because in this case neutral interests may be involved, and for the protection of neutral interests in such cases it has become the practice of nations to have the capture passed upon by a prize court of the captor, even although the vessel or property may have been destroyed or sold by the captor or for some other reason is not brought before the court.

As between the enemy governments or the enemy citizens or subjects, the decision of a prize court is not necessary, because the law of nations allows innocent unoffending property belonging to enemy citizens or subjects, that is to say, enemy property that cannot be used for a warlike purpose, to be captured. Thus Mr. Hall says, in his masterly treatise on international law, 4th edition, pp. 474-475:

As the property in an enemy's vessel and cargo is vested in the state to which the captor belongs so soon as an effectual seizure has been made, they may in strictness be disposed of by him as the agent of his state in whatever manner he chooses. So long as they were clearly the property of the enemy at the time of capture, it is immaterial from the point of view of international law whether the captor sends them home for sale, or destroys them, or releases them upon ransom. But as the property of belligerents is often much mixed up with that of neutrals, it is the universal practice for the former to guard the interests of the latter, by requiring captors as a general rule to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy. And though the right of a belligerent to the free disposal of enemy property taken by him is in no way touched by the existence of the practice, it is not usual to permit captors to destroy or ransom prizes, however undoubted may be their ownership, except when their retention is difficult or inconvenient.

In this case, it is not necessary to discuss the policy of destroying prizes in which neutral persons are interested, because wanton destruction of the property does not free the captor from liability to the neutral if his property was unlawfully destroyed. In the case of an enemy ship or property, the prize proceeding is required in the interest of the neutral. In the case of neutral vessel or neutral property upon such a vessel, the necessity for a judicial proceeding is all the more evident because the enemy possesses but a limited right to seize a neutral ship or neutral property, and the decision of a prize court is requisite in order clearly to ascertain that the seizure of neutral property was in accordance with the law of nations, and therefore justifiable.

It will be observed that the court to which the validity of the capture is submitted is the court of the captor, and the question arises whether this tribunal is to be considered as a municipal court or as a court of international law, because, although sitting within the jurisdiction of the captor, it is supposed to administer the law of nations, or at least it is by virtue of a principle of international law that the capture of enemy property or the seizure of neutral property upon the high seas is permitted. It is frequently said, and maintained, that the prize court, although sitting within the captor's country, is international — not municipal; and it becomes necessary to consider this question with some care, because if it should turn out that the court sitting within a particular country is municipal, it would follow that its judges are municipal judges, and that as such they are bound by municipal law and that in fact they administer

municipal law when it differs from the law of nation. Now, it would appear that if a court is created by a particular nation, if that court sits within the jurisdiction of this nation, and if the judges, like other judges, are appointed by this nation, and, like other judges, take the oath of allegiance to the nation appointing them, it would seem that such courts are municipal in fact, although they may be international in theory.

JAMES BROWN SCOTT

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Vie Int.*, La Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris, *B.*, boletín, bulletin, bollettino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletín de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazetta; *Cd.*, Great Britain, Parliamentary Papers; *Current History*, Current History — A Monthly Magazine of the New York Times; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalisme Scientifique, The Hague; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Martens*, Nouveau recueil général de traités, Leipzig; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

January, 1916.

- 14 CHILE-URUGUAY. Chilean decree issued putting into effect the treaty providing for peace, signed Feb. 27, 1915, ratifications of which were exchanged Dec. 31, 1915. Spanish text: *B. rel. ext.* (Chile), 64: 31.
- 18 GREAT BRITAIN-HONDURAS. Accession of New Zealand to the treaty of commerce with Honduras, signed May 5, 1910. *G. B. Treaty Series*, No. 4, 1916, No. 7, 1915.
- 24 GERMANY. Germany replied to the charge of ill-treatment of French civil population in the occupied territories. French text: *R. gén. de dr. int. pub.*, doc. 23: 178, 181.
- 27 FRANCE. Changes in contraband list announced. *J. O.* 1916, 744.
- 29 BELGIUM-FRANCE. Accord signed relative to penal jurisdiction. *J. O.* 1916, 809.
- 31 EGYPT. The Sultan of Egypt prorogued the Mixed Tribunals of Egypt till Feb. 3, 1917: *J. O. (Egypt)*, Jan. 3, 1916; *Clunet*, 43: 1676.

February, 1916.

- 4 CHILE-CHINA. Ratifications exchanged of the treaty of friendship signed Feb. 8, 1915. Chilean law putting the treaty into effect dated March 24, 1916. Spanish text: *B. rel. ext. (Chile)*, 65:15.
- 15 FRANCE-GREAT BRITAIN. Accord relative to the treatment of mails captured or seized. French text: *R. gén. de dr. int. pub., doc.* 23:175.

March, 1916.

- 15 FRANCE. Law passed relative to maritime prizes. *J. O. March* 18, 1916.
- 22 GERMANY. Note verbale of Germany to the Spanish Ambassador, upon the obligation to work imposed upon Civilians interned in France. *R. gén. de dr. int. pub., doc.* 23:182.

April, 1916.

GERMANY. Proclamation of the Governor of Lille announcing the removal of men and women. Protest of the Mayors and Bishop of Lille, Roubaix and Turcoing. Texts: *R. gén. de dr. int. pub., doc.*, 23:184.

May, 1916.

- 4 CHINA-NETHERLANDS. Dutch proclamation of the arbitration treaty signed June 11, 1915, ratifications of which were exchanged April 20, 1916. Dutch and French texts: *Staatsblad*, 1916, No. 181.
- 11 GREAT BRITAIN-HONDURAS. Accession of Barbados, Bermuda, British Guiana, British Honduras, Ceylon, Cyprus, Falkland Islands, Federated Malay States, Gambia, Gold Coast, Grenada, Hong Kong, Jamaica (including Cayman Islands and Turks and Caicos Islands), Leeward Islands, Malta, Mauritius, Nyasaland Protectorate, St. Helena, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Somaliland, Straits Settlements, Trinidad, Uganda Protectorate and Wei-Hai-Wei, to the treaty of commerce with Honduras, signed May 5, 1910. *G. B. Treaty Series*, 1915, No. 7 1916, No. 4.

June, 1916.

- 1 GUATEMALA-UNITED STATES. Agreement effected by exchange of notes extending the time for the appointment of the commission

June, 1916.

- under Article II of the treaty of Sept. 20, 1913. English texts: *U. S. Treaty Series*, No. 598-B.
- 22 NICARAGUA-UNITED STATES. Ratifications exchanged of the convention relating to the Nicaragua Canal route. English and Spanish texts: *U. S. Treaty Series*, No. 624
- 24 FRANCE-NETHERLANDS Dutch proclamation of convention signed Sept. 30, 1915, relative to frontiers of Surinam and French Guiana. French text: *Staatsblad*, 1916, No. 304.
- 27 ARABIA. El Hussein ibn Ali, Grand Shereff of Mecca, proclaimed the new state of Arabia. On Nov. 11, Arabia asked recognition of the United States. On Dec. 2, a protest was received by the United States against atrocities at Medina. *Current History* 5: 393; text of protest: *N. Y. Times*, Dec. 3, 1916.

July, 1916.

- 15 COLOMBIA-ECUADOR. Boundary treaty signed. *P. A. U.* 43: 287.
- 17 FRANCE. Protest made by France against the arrest of 300 French citizens at Roubaix for refusing to work for the Germans. Text: *R. gén. de dr. int. pub., doc.* 23: 178.
- 22 GERMANY. Ordinance issued relative to contraband of war. English translation (amended): *London Gazette*, No. 29730; summary *N. Y. Times*, July 26, 1916.

August, 1916.

- 3 MEXICO. The Carranza Government issued decrees nullifying certain acts of the Huerta Government. Spanish text: *D. O. (Mexico)*, Aug. 12, 1916.
- 14 PORTUGAL. Proclamation relating to Portuguese Prize Courts. *Diario do Governo (Portugal)*, Aug. 14, 1916. English translation: *London Gazette*, No. 29822.
- 15 MEXICO. Carranza Government issued decree requiring all persons holding or desiring to hold concessions from the Mexican Government to become naturalized citizens of Mexico. Spanish text: *D. O. (Mexico)*, Sept. 5, 1916.
- 20 NETHERLANDS. Declaration of neutrality made in the war between Germany and Italy. Dutch text: *Staatscourant*, Aug. 20, 1916.

August, 1916.

- 21 STATUS OF SUBMARINES. France and Great Britain addressed identic notes to the neutral powers relative to the status of submarines in neutral waters. *Text in Special Supl. to this Journal*, October, 1916, p. 342.
- 29 UNITED STATES. The President signed the Naval Appropriation Act (Public 241), which contains a request that the President, at an appropriate time, call a conference of the great governments to formulate a plan for a court of arbitration and to consider the question of disarmament. *Stat. at L., Pub. No. 241, 64th Cong., 1st sess.*
- 30 GREECE. Greek revolutionists at Salonika seized the barracks of the Greek infantry, proclaimed a provisional republic and called upon the people to combine with the Allies and drive out the Bulgarians. *N. Y. Times*, Aug. 31, 1916.
- 30 SPAIN. Declaration of neutrality made in the war between Germany and Italy. Spanish text: *Ga. de Madrid*, Aug. 30, 1916.
- 31 FRANCE. France addressed protest to the neutral Powers against the treatment of French citizens in territory occupied by Germany. *R. gén. de dr. int. pub., doc. 23*: 178.
- 31 ROUMANIA-TURKEY. Turkey delivered a declaration of war to the Roumanian minister at Constantinople, at 8 p.m., Aug. 31. *N. Y. Times*, Sept. 2, 1916.
- 31 UNITED STATES. Reply made to identic notes of France and Great Britain of Aug. 21, regarding the status of submarines in neutral waters. *Text in Special Supl. to this Journal*, October, 1916, p. 343.

September, 1916.

- 13 GREAT BRITAIN-UNITED STATES. Provisions of the treaty of commerce signed March 2, 1899, extended to Porto Rico. *G. B. Treaty Series*, 1900, No. 17; 1916, No. 4.
- 17 SPAIN. Declaration of neutrality made in the war between Roumania and Turkey. Spanish text: *Ga. de Madrid*, Sept. 17, 1916.
- 27 GREECE. M. Venizelos headed revolution in Greece. On Oct. 10 headquarters of the provisional government were established at Salonika. *N. Y. Times*, Sept. 29, 1916.

October, 1916.

- 1 GERMANY-SWITZERLAND. Announced that a trade agreement had been reached whereby each country's own products and goods so far as they are not necessary for home consumption may be exchanged. Requests for the raw material needed from Germany for Swiss manufacture will be submitted to the examination of a Swiss expert Committee. The agreement ends April 30, 1917. On Oct. 17 Switzerland put an embargo on the export of munitions for the Allied Powers. *N. Y. Times*, Oct. 2, 18, 1916.
- 3 GREAT BRITAIN. Additional contraband list issued. *London Gazette*, No. 29772.
- 5 UNITED STATES. Alien Land Law of California. Suit to escheat the home of Yukeihi Harada, a Japanese, brought by the Assistant Attorney General of California to test the Alien Land Law of 1913. *N. Y. Times*, Oct. 6, 1916.
- 10 SPAIN. Reported that Spain had issued definite orders against the revictualing of submarines in Spanish waters. *Washington Post*, Oct. 11, 1916.
- 10 GREAT BRITAIN-UNITED STATES. Note in reply to the American note of July 28, 1916, relative to the British Trading with the Enemy Act, 1915. *Text issued by the Dept. of State*.
- 11 JAPAN-CHINA. Reported that Japan had made further demands on China. *Text: N. Y. Times*, Nov. 15, 1916.
- 11 GREECE. Greece announced compliance with the demands of the Allies to turn over the entire Greek fleet and sea-coast forts or to dismantle them. *N. Y. Times*, Oct. 12, 1916.
- 12 FRANCE-GREAT BRITAIN-UNITED STATES. France and Great Britain replied to the American protest against the interference with mails. *Text in Special Supl. to this Journal*, Oct. 1916, p. 418.
- 13 NORWAY. Norway issued an ordinance regulating the operations of submarines in Norwegian waters. On Oct. 23 Germany protested against this ordinance. On Nov. 12, Norway replied to the German protest. *N. Y. Times*, Oct. 14, Nov. 13, 1916.
- 14 GREECE. The Allies recognized the provisional government of Venezelos in Crete. *N. Y. Times*, Oct. 17, 1916.
- 17 GREECE. Allied troops landed in Athens. Greek warships seized by the Allies. *N. Y. Times*, Oct. 18, 1916.

October, 1916.

- 17 SWITZERLAND. An embargo put on the export of munitions of war to the Allies in consequence of the economic agreement with Germany reached Oct. 1, 1916. *N. Y. Times*, Oct. 18, 1916.
- 18 NORWAY. Request of the Allies that submarines be debarred from Norwegian waters refused. *N. Y. Times*, Oct. 19, 1916.
- 21 AUSTRIA. Count Karl Sturgekh, Premier of Austria, was assassinated. On Oct. 27 Dr. Ernst von Koerber became Premier. Unable to form a cabinet, he resigned Dec. 20, 1916. *N. Y. Times*, Dec. 22, 1916.
- 21 MEXICO-UNITED STATES. Judge Advocate General Crowder of the U. S. Army rendered a decision holding that for army administrative purposes the Pershing expedition in Mexico creates a legal state of war. *N. Y. Times*, Oct. 22, 1916.
- 28 MARINA. The British steamer *Marina* sunk. *N. Y. Times*, Nov. 1, 1916.
- 28 LANAO. The *Lanao*, flying the American flag and under Philippine register, was sunk off the coast of Portugal by a German submarine. *N. Y. Times*, Nov. 8, 1916.
- 28 BRAZIL-UNITED STATES. Ratifications exchanged of treaty for the advancement of peace. English and Spanish texts: *U. S. Treaty Series*, No. 627.

November, 1916.

- 3-4 COLOMBIA-UNITED STATES. Colombia protested to the United States against the Nicaraguan Canal Treaty. Colombia claims Great and Little Corn Islands under the cedula of Nov. 30, 1803. The Colombian Senate also passed resolutions protesting against the conduct of the United States in the Panama question. *Washington Post*, Nov. 3, 6, 1916.
- 5 POLAND. The independent Kingdom of Poland was proclaimed by Germany and Austria. Text of proclamation: *London Times (Weekly)*, Nov. 10; *N. Y. Times*, Nov. 7, 1916.
- 6 ARABIA. The P. & O. steamer *Arabia* sunk. *N. Y. Times*, Nov. 9, 1916.
- 7 COLOMBIAN. American steamer *Colombian* sunk off coast of Spain by a German submarine. *N. Y. Times*, Nov. 8, 1916.
- 9 GERMANY. The German Chancellor announced that he favored a league of peace. *N. Y. Times*, Nov. 10, 1916.

November, 1916.

- 10 AUSTRIA-HUNGARY-UNITED STATES. Austria-Hungary announced the appointment of Count Adam Tarnowsky as Ambassador to the United States. The United States asked his safe conduct from the Allies and on Nov. 15 this was granted. *N. Y. Times*, Nov. 11, 16, 1916.
- 11 ARABIA. The state of Arabia asked recognition of the Powers as a kingdom separate from Turkey. *N. Y. Times*, Dec. 4, 1916.
- 14 BELGIUM. The United States unofficially protested against the deportation of Belgians to work in Germany. *N. Y. Times*, Nov. 15, 1916.
- 15 BELGIUM. The Belgian Legation at Washington made public a note sent by Belgium to the United States protesting against the deportation of Belgians to work in Germany. Text: *N. Y. Times*, Nov. 17, 1916.
- 18 KRONPRINZESSIN CECILE. The United States Circuit Court of Appeals in Boston decided that the National City Bank and the Guaranty Trust Company, both of New York, are entitled to recover damages from the North German Lloyd Steamship Company resulting from the abandonment of the voyage of the Steamship *Kronprinzessin Cecile* the day before war was declared in Europe. The lower court held that they were entitled to no damages. The passengers were held not entitled to damages. *N. Y. Times*, Nov. 19, 1916.
- 20 GREECE. The Commander of the Allied fleet in Greek waters ordered the German, Austrian, Turkish and Bulgarian ministers to return to their respective countries, with their staffs. *N. Y. Times*, Nov. 24, 1916.
- 21 AUSTRIA-HUNGARY. Emperor Francis Joseph of Austria died. Archduke Charles Francis Joseph, grandnephew of the late Emperor, took the oath as Emperor Charles I. *N. Y. Times*, Nov. 22, 1916.
- 24 GREECE. The Allies issued an ultimatum to Greece requiring the deliverance of Greek arms and ammunition. *N. Y. Times*, Nov. 27, 1916.
- 24 GREAT BRITAIN. Order in Council making certain additions to and amendments in the list of contraband of war. Under these amendments gold, silver, paper money and all negotiable in-

November, 1916.

- struments and realizable securities are made contraband. *London Gazette*, No. 29825.
- 24 MEXICO-UNITED STATES. A protocol was signed at Atlantic City by the Joint Commission, which provides for the withdrawal of American forces from Mexico within 40 days, if the border is made safe by Mexican troops. An additional memorandum was signed which provides that the American troops may pursue bandits into Mexico if necessary. *N. Y. Times*, Nov. 25, 1916.
- 25 GREECE. The German Ambassador addressed a protest to the Department of State against the action of the Allied Powers in ordering the Ministers of Germany, Austria, Turkey and Bulgaria from Greece. *N. Y. Times*, Nov. 26, 1916.
- 25 GREECE. The provisional government of Greece under M. Venizelos declared war against Germany and Bulgaria. *N. Y. Times*, Nov. 26, 1916.
- 29 SANTO DOMINGO. The United States proclaimed military rule over Santo Domingo. Captain H. S. Knapp, U.S.N., assumed command. *N. Y. Times*, Dec. 1, 1916.

December, 1916.

- 4 GERMANY. Germany sent note relative to the sinking of the steamer *Arabia*. *N. Y. Times*, Dec. 8, 1916.
- 5 GREAT BRITAIN. Premier Henry Asquith resigned. On Dec. 7 Rt. Hon. David Lloyd George accepted the post of Premier. *N. Y. Times*, Dec. 6, 8, 1916.
- 8 GREECE. The Allies declared a blockade of Greece to date from 8 P.M. An embargo was placed on all Greek shipping in allied ports. *J. O.*, Dec. 8, 1916.
- 9 GREAT BRITAIN-UNITED STATES. Ratifications exchanged of the treaty signed Aug. 16, 1916, for the protection of birds in the United States and Canada. *U. S. Treaty Series* No. 628.
- 11 COLOMBIA-VENEZUELA. Treaty relative to boundary, commerce, and navigation put into force in Colombia. *Washington Post*, Dec. 12, 1916.
- 12 GERMANY. Germany and her allies addressed notes to the neutral Powers for transmission to the Allied Powers, offering to negotiate peace. Austria issued a separate statement. The offer was refused by France and Russia. On Dec. 18, Premier Lloyd

December, 1916.

George addressed Parliament, refusing the offer as made and calling on Germany and her allies to specify the terms of peace acceptable to them if they desired to open negotiations. Texts: *N. Y. Times*, Dec. 13, 20, 1916.

- 16 GREECE. Greece replied to the ultimatum of the allies accepting without reserve the terms laid down. *N. Y. Times*, Dec. 17, 1916.
- 18 UNITED STATES. The President of the United States, through the American representatives to the belligerent and neutral powers suggested that the nations now at war make an avowal of their respective views as to the terms upon which the war may be ended. *Text issued by the Dept. of State.*
- 22 DANISH WEST INDIES. The King and Council of Denmark ratified the sale of the Danish West Indies to the United States. *N. Y. Times*, Dec. 23, 1916.

INTERNATIONAL CONVENTIONS

Adhesions, Ratifications, Denunciations

AGRICULTURE. International Bureau. Rome. 1906.

Adhesion:

Ecuador, Nov. 5, 1915. *J. O.* May 10, 1916.

AUTOMOBILES. Oct. 11, 1909.

Adhesion:

Dutch East Indies. *J. O.* Jan. 4, 1916.

INTERNATIONAL PENAL LAW. Montevideo, 1916.

Treaty relative to international penal law signed by Argentine Republic, Bolivia, Paraguay, Peru and Uruguay. *R. de la Universidad (Tegucigalpa)*, June, 1916, p. 363.

INTERNATIONAL RADIOTELEGRAPH. London, July 5, 1912.

Ratifications:

Uruguay. Feb. 29, 1916. *G. B. Treaty Series*, 1916, No. 4.

French possessions in Oceanica, Feb. 3, 1916. *G. B. Treaty Series*, 1916, No. 4.

INTERNATIONAL TELEGRAPH CONVENTION. Petrograd, July 10, 22,
1875.

Adhesion:

France for French Somali. *R. gén. de dr. int. pub.* 23: 492.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN ¹

Alien. Order of the Secretary of State. April 15, 1916. St. R. & O. 1916, No. 287, 1½d.

———. Order in Council further amending the Aliens Restriction (Consolidation) Order, 1916. June 27, 1916. St. R. & O. 1916, No. 416, 1½d.

———. July 7, 1916. St. R. & O. 1916, No. 451. 1½d.

———. Sept. 7, 1916. St. R. & O. 1916, No. 607. 1½d.

Belgium. 13th to 22d Reports of the official commission of the Belgian Government on the violation of the rights of nations and of the laws and customs of war in Belgium. Vol. II. 9d.

Belligerent rights. Further correspondence between His Majesty's Government and the United States Government respecting. Cd. 8233. 3½d.

———. Cd. 8234. 4d.

British property in enemy territory and claims against enemy persons and governments. Proclamation requiring returns to be made of. Sept. 7, 1916. St. R. & O. 1916, No. 605. 1½d.

Contraband of war. Proclamation making further additions to the list of articles of. June 27, 1916. St. R. & O. 1916, No. 415. 1½d.

Customs. The Exportation to Liberia Prohibition Proclamation, April 26, 1916. St. R. & O. 1916, No. 259. 2½d.

———. Proclamation consolidating previous proclamations and Orders in Council prohibiting the exportation of certain articles. May 10, 1916. St. R. & O. 1916, No. 290. 2d.

———. Order in Council varying Proclamation of May 10, 1916. June 28, 1916. St. R. & O. 1916, No. 418. 1½d.

———. July 4, 1916. St. R. & O. 1916, No. 434. 1½d.

———. July 26, 1916. St. R. & O. 1916, No. 502. 1½d.

———. August 15, 1916. St. R. & O. 1916, No. 546. 1½d.

¹ Official publications of Great Britain may be purchased of Wyman & Sons, Ltd., Fetter Lane, E.C., London, England.

———. September 8, 1916. St. R. & O. 1916, No. 608. 1½d.

———. Order in Council revoking Order of Nov. 15, 1915, whereby tobacco was added to the list of accepted articles which are not required to be consigned to the authorized persons referred to in the amended schedule to the Proclamation of June 25, 1915, relating to exportation to the Netherlands. St. R. & O. 1916, No. 435. 1½d.

———. Proclamation prohibiting the exportation to Sweden of all articles other than those therein excepted. August 18, 1916. St. R. & O. 1916, No. 557. 1½d.

———. The Prohibition of Import (No. 5) Proclamation, May 10, 1916. St. R. & O. 1916, No. 289. 1½d.

———. (No. 8) July 28, 1916. St. R. & O. 1916, No. 508. 1½d.

———. (No. 9) Aug. 18, 1916. St. R. & O. 1916, No. 558. 1½d.

Declaration of London. The Maritime Rights Order in Council, July 7, 1916, withdrawing the Declaration of London Order in Council No. 2, 1914, and all Orders amending the same, and ordering that certain provisions as to belligerent rights at sea shall be observed. St. R. & O. 1916, No. 452. 1½d.

Note addressed by His Majesty's Government to neutral representatives in London respecting the. Cd. 8293. 1d.

Denmark-United Kingdom. Convention renewing for a further period of five years the arbitration convention of Oct. 25, 1905. Treaty Series, 1916, No. 3. 1d.

German atrocities and breaches of the rules of war in Africa. Papers relating to. Cd. 8306. 1s.

Greek Government. Collective note addressed to the, by the French, British, and Russian Ministers, and the reply of the Greek Government. Cd. 8298. 1½d.

Internment camp at Ruhleben. Further correspondence respecting the conditions of diet and nutrition in the. Cd. 8262. 2d.

———. Cd. 8296 (including proposed release of civilians). 1½d.

Internment camps in the United Kingdom. Reports of visits of inspection made by officials of the United States Embassy. Cd. 8324. 8½d.

Ireland, rebellion in. Report of royal commission on. Cd. 8279. 2½d.

———. Minutes of evidence and appendix of documents. Cd. 8311. 1s. 4d.

Mail, British transit, to Russia. Correspondence with Swedish Minister respecting the detention of by the Swedish Government as

a reprisal for the search of parcels mail by His Majesty's Government. Cd. 8322. 4d.

Mails, Examination of parcels and letter. Note of the United States Ambassador regarding the. Cd. 8294. 1d.

Prisoners of war. Correspondence with His Majesty's Minister at Berne respecting the question of reprisals against. Cd. 8323. 1d.

Prisoners of war and interned civilians, British, in Germany. Further correspondence with the United States Ambassador respecting. Cd. 8235. 1s. 1d.

———. Cd. 8297. 7½d.

Relief of allied territories in the occupation of the enemy. Correspondence with the United States Ambassador regarding the. Cd. 8295. 1d.

Trading with the Enemy Amendment Act, 1916. Summary of cases dealt with by the Advisory Committee up to June 2, 1916, inclusive, and the recommendations made therein. Cd. 8308. 1d.

Trading with the Enemy (Copyright) Act. 6 & 7 Geo. V. Ch. 32. 1d.

Trading with the Enemy (Statutory List) Proclamation (No. 2), April 26, 1916. (St. R. & O. 1916, No. 258.) 1½d.

———. Order in Council varying Statutory List. May 2, 1916. St. R. & O. 1916, No. 263. 1½d.

———. May 9, 1916. St. R. & O. 1916, No. 291. 1½d.

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GEO. A. FINCH

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

COSTA RICA v. NICARAGUA ¹

CENTRAL AMERICAN COURT OF JUSTICE

*San José de Costa Rica, on the thirtieth day of September, nineteen
hundred and sixteen, at seven o'clock, p. m.*

IN the action commenced and maintained by the Government of the Republic of Costa Rica against the Government of the Republic of Nicaragua, arising out of the conclusion of a treaty between the latter and the Government of the United States of North America, relating to the construction of an interoceanic canal, the Court, having considered the proceedings had herein, hereby renders its decision thereof.

PRELIMINARY CHAPTER

It appears:

That on the 24th of March of the current year the Licentiate don Luís Castro Urefia, appearing in the name, and as the representative, of the Government of Costa Rica, in accordance with powers to that end duly exhibited, brought before this Court a complaint against the Government of Nicaragua wherein were set forth the arguments of fact and law in support of his claims, together with the evidence he considered pertinent to the action.

SECTION I

The Court being without a full bench because of the absence therefrom of the member from Nicaragua, and being thereby disqualified to pass upon the first step in the proceedings invoked by

¹ Translation published by the Costa Rican Legation, Washington, D.C. The official text of the decision is contained in *La Gaceta* (Costa Rica), October 7, 1916.

the complaint, the Permanent Committee proceeded to prescribe the measures necessary for the immediate completion of the Court and to that end dispatched an urgent telegram to the absent member requesting him to forego the enjoyment of the balance of his vacation in view of the fact that the Government of Costa Rica had presented a complaint against the Government of his country. Anticipating, however, that the judge might not be able to return immediately to his place on the bench, the Permanent Committee also addressed itself to His Excellency the Minister of Foreign Relations of Nicaragua calling his attention to the situation and asking him to make the necessary dispositions for the completion of the Court by sending the substitute justice.

It appears:

That the absent justice, in reply to these urgent appeals, stated that he would make an effort to return to Costa Rica on the next steamer, and that, should this be impossible, he would immediately so notify the Minister of Foreign Relations of his country. That high functionary, on his part, in a telegraphic dispatch of April 1, stated that he had been advised of the complaint brought before the Court and that the telegraphic communication addressed to him by the Secretary of the Permanent Committee was answered by the reply he had given to His Excellency the Costa Rican Secretary of Foreign Relations when the latter, in his turn, had notified him of the presentation of the complaint and of the reasons that prompted the Costa Rican Government to bring that action.

In the reply alluded to, the Nicaraguan Chancellor stated, among other things, that his Government, in entering into the treaty with the United States, had confined itself exclusively to the territorial limits of Nicaragua that belonged to her as an independent state, seeking only to promote her welfare and progress and respecting in all ways the integrity and legitimate rights of the other Central American Republics;

That Nicaragua had been at all times perfectly qualified to enter into contracts of the character of the Chamorro-Bryan Treaty, and that she was by no means disposed to consent to a discussion of private rights pertaining to the inherent sovereignty of the state;

That with respect to Costa Rica all questions that had been rife

with Nicaragua at other periods relating to the frontier and to participation in the interoceanic canal had been decided once and for ever by the award of President Cleveland;

That Nicaragua had strictly complied with that award, as she stood ready to do when the time should come for granting concessions for the construction of the interoceanic canal; but that, with respect to the rights which that award insured to Nicaragua as sole sovereign over the territory in which said canal was to be constructed, and as absolute owner of the benefits that she might derive in compensation for the favors and privileges to be conceded by her Government, she would not permit them to be made the subject of judicial determination, since the award, by its very nature, is not subject to revision or interpretation by any arbitral tribunal;

That the Central American Court of Justice was not competent to admit such a complaint as the one brought before it by the Government of Costa Rica, because, according to Article I of the Convention of Washington creating that Court, it could only be clothed with the character of an arbitral tribunal having jurisdiction over controversies or questions arising between the signatory parties when their respective chancelleries are unable to reach a settlement, and when, in conformity with the article cited, resort to that Court alone remains, in cases in which any settlement between the parties has become impossible after the failure of the requisite courses of diplomacy;

That the Costa Rican Secretary of Foreign Relations has at no time expressed to the Nicaraguan Foreign Office, either directly or indirectly, a single thought that would reveal his Government's opposition to the conclusion of the Bryan-Chamorro Treaty;

That for these reasons the Government of Nicaragua considers the complaint presented to be futile and outside the competency of the Central American Court of Justice, and, in the full security of its rights, believes it can count on complete concurrence in this viewpoint by the Court and on the refusal of that tribunal to entertain the proceeding; and —

That, since consideration of the action by the Central American Court of Justice would be without effect and a violation of the Convention of Washington of 1907, the Government of Nicaragua trusts that the Court will adhere to the clear, explicit, and positive letter of that pact and withhold its consideration of the case.

SECTION II

In its telegram dated the 26th of April of the present year, the Nicaraguan Chancellery transmitted to this Court a copy of its reply to another dispatch from the Costa Rican Chancellery. In that reply it confirmed and amplified the arguments contained in the document referred to in the preceding paragraphs, and added that Costa Rica prays the Central American Court of Justice to declare the legal incapacity of Nicaragua to enter into conventions of the nature of that which was signed on the 5th of August, 1914, between the latter Republic and the United States of America;

That on this point the Government of Nicaragua hastens to declare again that Nicaragua not only has always been, and will always be, possessed of full legal capacity to enter into and fulfill conventions of this character, but holds as offensive to her dignity as a free and independent nation any discussion of acts pertaining to her sovereignty — acts which in no case could become the subject of arbitrament;

That, with respect to the Cleveland Award, as to the interpretation of which Costa Rica believes differences exist that should be taken into account by the Central American Court in order to determine which of the two Governments is right, the Nicaraguan Chancellery asserts that that award, having once and forever resolved the differences that formerly existed between the two countries in relation to frontiers and to participation in the interoceanic canal, precludes absolutely and by its very nature the claim that it is subject to interpretation by any tribunal whatsoever, for if arbitral awards could be the subject of revision at the will of either of the parties, a decision of that kind could never be definitive in character and conflicts between nations would never end;

That the power possessed in certain cases by the Central American Court of Justice to act as an arbitral tribunal is confined expressly to those questions which may arise between states from and after the date on which the organic convention went into force among the contracting parties, but that under no conception could that power, even by violating the letter and spirit of the compact, extend to matters decided prior to the conclusion of that organic convention;

That, on the other hand, there has been no disagreement between the two Governments respecting the manner of interpreting the award of President Cleveland; and that, supposing the Costa Rican

Government should come to have doubts as to the validity and scope of that arbitral decision, this Court would not, in any case, be the forum charged with its interpretation, nor would those doubts affect the Chamorro-Bryan Treaty, which is wholly foreign to the matter;

And, finally, that for these reasons the complaint is wholly unreasonable and groundless, and that, in view of the foregoing, and of the points set forth in the telegram of April 1, the Central American Court of Justice should reject the complaint presented by the Government of Costa Rica; otherwise, it would flagrantly violate the convention that gave it life and its action in the case would be an absolute nullity.

SECTION III

Upon the return of the justice from Nicaragua, the Court regained its legal quorum on the 24th of April, and at its session of the 1st of May, following, took under consideration the complaint presented, which complaint contains the following elements set forth in two parts in Chapters I and II of this decision.

FIRST PART

CHAPTER I

ARGUMENTS OF FACT

It appears:

That the representative of the high party complainant has set forth in his complaint the following arguments of fact:

SECTION I

That in the beginning of April, 1913, his Government learned, through private sources, that the Legislative Assembly of Nicaragua had just given its approval, in secret session, to a treaty (also covered by secrecy) that had been concluded between the Government of the Republic of Nicaragua and the Government of the United States of America, among other things, for the opening of an interoceanic canal through Nicaraguan territory. That this news, the first it had received on the subject, moved the Costa Rican Government to

instruct its Minister in Nicaragua to present to the Government of that Republic a formal diplomatic protest against the execution of the canal pact referred to, on the ground that the Government of Costa Rica conceived, and would continue to conceive, such an act to constitute a flagrant violation of existing treaties between the two countries and of the Cleveland Award.

SECTION II

That at the same time that that diplomatic protest was being made, the Costa Rican plenipotentiary at Washington, following instructions from his Government, brought before the Government of the United States of America a similar diplomatic protest against the conclusion, on the part of Nicaragua, of the canal convention above mentioned, setting forth, as was done in the protest before the Nicaraguan Government, the conviction that the pact could only, at best, be held to be a nullity if account were taken of Nicaragua's legal incapacity to negotiate in the premises because of her failure previously to consult the opinion of Costa Rica regarding those negotiations and even to ask her acquiescence in the matter.

SECTION III

That His Excellency the Nicaraguan Minister of Foreign Relations, in his note of June 12, 1913, replied to the protest of the Costa Rican Minister, informing him that "the Government of Nicaragua exercised a right of incontestable sovereignty when it entered into the convention of February 8, 1913, with the United States, which convention has been kept secret for reasons of an international character that affect not it alone; but declares in the most positive manner that, in entering into that pact, it has not ignored any right that belongs to Costa Rica; nor has it committed any violation of the treaties existing between the two nations"; that "that convention . . . tends towards procuring, as far as possible, the construction of an interoceanic canal through a route exclusively Nicaraguan"; that the convention "merely deals with a preferential right, granted to the United States, to open an interoceanic passageway through a route to be designated out of national territory when it shall be decided, by agreement between the two Governments, to undertake the construction thereof, at which time the conditions under which the

canal shall be constructed, operated, and maintained will be determined by a further treaty or convention between the contracting parties"; that "therefore, dealing with a simple option for a canal concession, Nicaragua, as sole sovereign over the territory that will be the site of the great undertaking, is wholly within her incontestable rights in entering singly and alone into that engagement"; and that "in view of the foregoing, . . . the ideas expressed in the note to which this is an answer are in every regard unreasonable, for, as has been shown by an abundance of reasons and arguments, when the convention in question was entered into there was on the part of Nicaragua no violation of existing treaties nor discourtesy to Costa Rica, nor any disregard or forgetfulness of her legitimate rights."

SECTION IV

That *La Republica*, an independent newspaper of this city, in its issue No. 8810 of July 4, 1913, published the text of the treaty which, according to that paper, had been signed by the Governments of Nicaragua and the United States of America, relating to the opening of the canal just referred to; and that, although the Government of Costa Rica did not attribute authenticity to the publication, it desires to make known the fact that Nicaragua, who was aware of the publication, did not disavow it either through the press or otherwise; and that *La Republica* was a journal violently opposed to the Government of Costa Rica.

That the Minister of Costa Rica in Nicaragua, in obedience to the instructions of his Government, placed in the hands of the Nicaraguan Government a copy of the issue of the newspaper referred to, together with a note in which he requested to be informed "categorically whether the text of said convention as therein published is authentic, as well generally as in each of its paragraphs, and, if not, that you make the appropriate corrections."

That His Excellency the Nicaraguan Secretary of Foreign Relations, in his note of August 4, 1913, replied to the communication of the Costa Rican Minister, informing him, "in confirmation of the statements contained in my note of the 12th of last June, that for considerations of an international character that involve not alone my own Government, the latter is keeping secret the convention entered into with the United States on the 8th of last February; and

that, since it relates to a pact not yet perfected, it is not proper for the Government of Nicaragua, on its part, for the reasons contained in its said note, to make any official declaration regarding any of the steps in such negotiations."

SECTION V

That later, through the medium of the North American press, and not officially, his Government learned that the Senate of that country was considering a treaty which the Costa Rican Government assumed was the same that had been reproduced in the newspaper *La Republica*, to which reference has already been made, and the same alluded to by His Excellency the Nicaraguan Secretary of Foreign Relations, in his notes of June 12 and August 4, 1913, as having been signed by the Governments of Nicaragua and the United States of America, relating to the opening of a canal through Nicaraguan territory, and to other matters then unimportant to his Government: and his Government also learned of certain steps undertaken by private individuals, interested in behalf of Costa Rica, before different Senators, to the end that when the treaty should be debated in the Senate and the treaty ratified, the rights of that country in relation to the construction of any interoceanic canal should not only not be lost sight of but should be respected and guaranteed.

SECTION VI

That, unofficially, towards the middle of August, 1914, the Government of Costa Rica was assured that the treaty for a canal across Nicaragua had been in fact tacitly withdrawn from consideration by the Senate of the United States of America, but that that body had before it at the time another pact similar in groundwork at least (if not identical) as to a canal across Nicaragua and negotiated by the same high contracting parties that had concluded the first, that is, the one bearing date of February 8, 1913; but that the Government of Costa Rica received no official notice of the new pact, nor advised respecting the signature and contents of the other agreement: nor was it informed respecting the then status of the negotiations in progress, because these were consummated in the strictest secrecy, as well on the part of the United States of North America as on the part of Nicaragua.

SECTION VII

That for these reasons the Government of Costa Rica was unable to formulate exact objections against the treaty of February 8, 1913, relating to an interoceanic canal across Nicaraguan territory; nor could it attack, except in the most general way, *any analogous compact* entered into later by the same parties, for, against the solemn and explicit promises of Nicaragua, her first care on that occasion was to conceal at all hazards from Costa Rica her negotiations relating to the canal.

SECTION VIII

That the balance of the year 1914 and all of 1915 passed without action by the North American Senate in the matter of the Nicaraguan canal, or at least, the Government of Costa Rica never heard anything to the contrary; and that while Costa Rica's mind was at rest on the subject, the *Evening Star* of February 2, of the present year, announced that the Committee on Foreign Relations of the North American Senate had recommended to that body the ratification of the treaty that had been concluded more than a year before by the Government of the United States with the Government of Nicaragua, among other objects, for the construction of an interoceanic canal through Nicaraguan territory.

SECTION IX

That on reading the advices published in the *Washington Star*, the Costa Rican Legation at Washington hastened to dispatch to the State Department of North America a carefully thought out note in which the Government of the latter country was appealed to to prevent the ratification by the Senate of the pact in question, on the ground that it was openly opposed to existing treaties between Costa Rica and Nicaragua, to the Cleveland Award, and to the harmonious sentiments that animated His Excellency the Chief Executive of the United States towards all the peoples of the Americas according to the then recent public and official declarations that had been made by him before over a thousand delegates from different nations that make up the American continent; and that with the same object in view the attorney for the Costa Rican Legation at Washington, Harry W. Van Dyke, Esquire, published a memorandum addressed

to the American Senate; but that effort failed as did the efforts of Costa Rica's Diplomatic Representative at Washington, for the *Congressional Record* of the 18th of February of that year recorded the news that the United States Senate, in executive session of the same day, had ratified a convention between the said Republic and that of Nicaragua, which had been subscribed at Washington on the 5th of August, 1914, and which, with additions adopted by that body, as translated into Spanish by the personal attorney of Costa Rica (because it has been impossible for that Government to secure a copy of the original Spanish text), reads as follows:

The Government of the United States of America and the Government of Nicaragua being animated by the desire to strengthen their ancient and cordial friendship by the most sincere coöperation for all purposes of their mutual advantage and interest and to provide for the possible future construction of an interoceanic ship canal by way of the San Juan River and the great Lake of Nicaragua, or by any route over Nicaraguan territory, whenever the construction of such canal shall be deemed by the Government of the United States conducive to the interests of both countries, and the Government of Nicaragua wishing to facilitate in every way possible the successful maintenance and operation of the Panama Canal, the two Governments have resolved to conclude a convention to these ends, and have accordingly appointed as their plenipotentiaries:

The President of the United States, the Hon. William Jennings Bryan, Secretary of State; and

The President of Nicaragua, Señor General Don Emiliano Chamorro, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the United States:

Who, having exhibited to each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. The Government of Nicaragua grants in perpetuity to the Government of the United States, forever free from all taxation or other public charge, the exclusive proprietary rights necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the great Lake of Nicaragua or by way of any route over Nicaraguan territory, the details of the terms upon which such canal shall be constructed, operated, and maintained to be agreed to by the two Governments whenever the Government of the United States shall notify the Government of Nicaragua of its desire or intention to construct such canal.

ART. II. To enable the Government of the United States to protect the Panama Canal and the proprietary rights granted to the Government of the United States by the foregoing article, and also to enable the Government of the United States to take any measure necessary to the ends contemplated herein, the Government of Nicaragua hereby leases for a term of 99 years to the Government of the United States, the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island; and the Government of Nicaragua further grants to the Government of the United States for a like period of 99 years the right to establish, operate, and

maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select. The Government of the United States shall have the option of renewing for a further term of 99 years the above leases and grants upon the expiration of their respective terms, it being expressly agreed that the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof.

ART. III. In consideration of the foregoing stipulation and for the purposes contemplated by this convention and for the purpose of reducing the present indebtedness of Nicaragua, the Government of the United States shall, upon the date of the exchange of ratification of this convention, pay for the benefit of the Republic of Nicaragua the sum of \$3,000,000 United States gold coin, of the present weight and fineness, to be deposited to the order of the Government of Nicaragua in such bank or banks or with such banking corporation as the Government of the United States may determine, to be applied by Nicaragua upon its indebtedness or other public purposes for the advancement of the welfare of Nicaragua in a manner to be determined by the two high contracting parties, all such disbursements to be made by orders drawn by the Minister of Finance of the Republic of Nicaragua and approved by the Secretary of State of the United States or by such person as he may designate.

ART. IV. This convention shall be ratified by the high contracting parties in accordance with their respective laws, and the ratifications thereof shall be exchanged at Washington as soon as possible.

In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereunto their seals.

Done at Washington, in duplicate, in the English and Spanish languages, on the 5th day of August, in the year 1914.

WILLIAM JENNINGS BRYAN. [SEAL.]

EMILIANO CHAMORRO. [SEAL.]

SECTION X

That as soon as the ratification of the Bryan-Chamorro Treaty by the United States Senate appeared in the *Congressional Record*, the Costa Rican Legation at Washington gave careful study to the document, and, having become convinced that its contents were notoriously contradictory of the unquestionable rights of Costa Rica established in the Cañas-Jerez Treaty, the Cleveland Award and the Central American Treaty of Washington, hastened to lay before the North American Foreign Office, under date of the 21st of February, of the present year, a protest, respectful but vigorous, against the action of the Senate — the only step which, at the moment, could have been taken by a country possessed of no forces or defense but the law.

That even up to this time, although the matter is no longer a secret of state, Nicaragua has not deigned to make any communication to Costa Rica concerning the great problem. Meanwhile His Excellency, the United States Minister Plenipotentiary in Costa Rica, did have the goodness, under instructions from his Government, to send to the Costa Rican Secretary of Foreign Relations a courteous note, in which, supposing evidently that Costa Rica was fully informed concerning all that had taken place, he advised him that the United States Senate, on the 18th of that month, had, by a vote of 55 to 18, consented to the ratification of the Nicaraguan Canal Treaty, and had made two amendments, copy of which he enclosed, together with copy of a resolution of the Senate that reads as follows:

Provided, That whereas Costa Rica, Salvador, and Honduras have protested against the ratification of said convention in the fear or belief that said convention might in some respect impair existing rights of said states, therefore it is declared by the Senate that in advising and consenting to the ratification of the said convention as amended, such advice and consent are given with the understanding to be expressed as part of the instrument of ratification that nothing in said convention is intended to affect any existing rights of any of the said named states.

The complaint adds that at the moment of receiving that communication from His Excellency the American Minister, the Government of Costa Rica was completely in the dark as to the language of the treaty in question.

CHAPTER II

LEGAL BASES

It appears:

That the high party complainant relies for support of its action upon the following legal antecedents:

SECTION I

The treaty of limits entered into between Costa Rica and Nicaragua on the 15th of April, 1858, and known as the Cañas-Jerez Treaty, stipulates in its conducive part as follows:

ART. 6. The Republic of Nicaragua shall have exclusive dominion and the highest sovereignty over the waters of the San Juan River from their issue out of

the lake to their discharge into the Atlantic; but the Republic of Costa Rica shall have in those waters perpetual rights of free navigation from the said mouth of the river up to a point three English miles below Castillo Viejo, for purposes of commerce, whether with Nicaragua or with the interior of Costa Rica, over the San Carlos or Sarapiquí rivers or any other course starting from the part which has been established as belonging to that republic on the banks of the San Juan. The vessels of either country may touch at any part of the banks of the river where the navigation is common without paying any dues except such as may be established by agreement between the two Governments.

ART. 8. If the contracts for canalization or transit entered into before the Nicaraguan Government had knowledge of this convention should for any cause cease to be in force, Nicaragua agrees not to conclude any others relating to the objects above stated without first hearing the opinion of the Costa Rican Government respecting the disadvantages that may result to the two countries, provided that opinion be given within thirty days after the request therefor shall have been received, in case that the Nicaraguan Government should indicate that a decision is urgent; and in the event that the enterprise should cause no injury to the natural rights of Costa Rica, that opinion shall be advisory.

SECTION II

By the Esquivel-Román Convention, entered into by Costa Rica and Nicaragua on the 24th of December, 1886, both Republics submitted to the unappealable arbitral decision of His Excellency, the President of the United States of America, the question that had long been rife between the two Republics above mentioned concerning the validity of the Cañas-Jerez Boundary Treaty, Article VII of which first-named treaty provides as follows:

The arbitral award, whatever it may be, shall be held by the contracting parties to be a perfect and obligatory treaty, it shall admit of no recourse whatsoever and its execution shall commence thirty days after having been notified to the two Governments or their representatives.

SECTION III

The Cleveland Award rendered on the 22d of March, 1888, as the outgrowth of the agreement contained in the Esquivel-Román Convention contains the following definite findings respecting the Cañas-Jerez Treaty of Limits and especially respecting the two articles transcribed from that pact:

First. The above-mentioned Treaty of Limits, signed on the 15th day of April, one thousand eight hundred and fifty-eight, is valid.

Second. The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the River

San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the "purposes of commerce" accorded to her in said article, or as may be necessary to the protection of said enjoyment.

Third. With respect to the points of doubtful interpretation communicated as aforesaid by the Republic of Nicaragua, I decide as follows:

10. The Republic of Nicaragua remains bound not to make any grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica, as provided in Article VIII of the Treaty of Limits of the 15th day of April, one thousand eight hundred and fifty-eight. The natural rights of the Republic of Costa Rica alluded to in the said stipulation are the rights which, in view of the boundaries fixed by the said Treaty of Limits, she possesses in the soil thereby recognized as belonging exclusively to her; the rights which she possesses in the harbors of San Juan del Norte and Salinas Bay; and the rights which she possesses in so much of the river San Juan as lies more than three English miles below Castillo Viejo, measuring from the exterior fortifications of the said castle as the same existed in the year 1858; and perhaps other rights not here particularly specified. These rights are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded; where there is an encroachment upon either of the said harbors injurious to Costa Rica; or where there is such an obstruction or deviation of the River San Juan as to destroy or seriously impair the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same.

11. The Treaty of Limits of the 15th day of April, one thousand eight hundred and fifty-eight, does not give to the Republic of Costa Rica the right to be a party to grants which Nicaragua may make for interoceanic canals; though in cases where the construction of the canal will involve an injury to the natural rights of Costa Rica, her opinion or advice, as mentioned in Article VIII of the treaty, should be more than "advisory" or "consultative." It would seem in such cases that her consent is necessary, and that she may thereupon demand compensation for the concession she is asked to make; but she is not entitled as a right to share in the profits that the Republic of Nicaragua may reserve for herself as a compensation for such favors and privileges as she, in her turn, may concede.

SECTION IV

That the Cañas-Jerez Treaty (the Treaty of Limits) has preserved its full obligatory force and effect down to the present day, as well by virtue of the categorical holdings in the Cleveland Award, which are set forth in the complaint, as by virtue of the permanent character of its stipulations. Wherefore, in the absence of mutual consent by the contracting parties, the treaty cannot be lawfully denounced or held to be dead, nor can the agreements therein stipulated be avoided so long as Costa Rica and Nicaragua continue as free nations,

and this chiefly because the force and validity of that pact has been recognized and proclaimed absolutely and without restriction as to any fixed or determined period by the arbitral decision of one of the most honorable and most influential chiefs of state in the entire world.

That it therefore seems inexplicable to his Government that Nicaragua should have negotiated in relation to a canal through its territory unmindful of Costa Rica, and with the very nation whose Government, as such, and by the choice of both contending parties, rendered the award which, in harmony with the Cañas-Jerez Treaty, incapacitated it from proceeding in the matter without obtaining the consultative, indeed the *decisive*, opinion, of the Republic of Costa Rica.

Because it would seem to be impossible to the Government he represents that a third Government should construct a navigation canal by way of the San Juan River without infringing by the operations, or indirectly as a result thereof, the contractual and natural rights of Costa Rica which had been fixed by the Cañas-Jerez Treaty and confirmed by the Cleveland Award.

That there can be no possible doubt about the matter, for if the United States of America, or an assignee of her rights, should adopt for the canal the San Juan River route, it is obvious that the United States and Nicaragua, not having made any express reservations whatsoever that would guarantee to Costa Rica the enjoyment of advantages conferred upon the latter by the Cañas-Jerez Treaty, that enjoyment must be subject, in the future, to a greater or less extent, to the good will of the United States.

That, in a word, Nicaragua has placed under the control of the United States, or sold to her, the San Juan River, unreservedly, just as though the former were the absolute owner of that stream and of its banks, and Costa Rica, who possesses the unquestionable right to navigate freely throughout the greater part of those waters, and who is the owner of the greater part of the southern banks of that river, has not been taken into account.

SECTION V

That Article IX of the General Treaty of Peace and Amity, concluded the 20th of December, 1907, between the five Republics that

to the American Senate; but that effort failed as did the efforts of Costa Rica's Diplomatic Representative at Washington, for the *Congressional Record* of the 18th of February of that year recorded the news that the United States Senate, in executive session of the same day, had ratified a convention between the said Republic and that of Nicaragua, which had been subscribed at Washington on the 5th of August, 1914, and which, with additions adopted by that body, as translated into Spanish by the personal attorney of Costa Rica (because it has been impossible for that Government to secure a copy of the original Spanish text), reads as follows:

The Government of the United States of America and the Government of Nicaragua being animated by the desire to strengthen their ancient and cordial friendship by the most sincere coöperation for all purposes of their mutual advantage and interest and to provide for the possible future construction of an interoceanic ship canal by way of the San Juan River and the great Lake of Nicaragua, or by any route over Nicaraguan territory, whenever the construction of such canal shall be deemed by the Government of the United States conducive to the interests of both countries, and the Government of Nicaragua wishing to facilitate in every way possible the successful maintenance and operation of the Panama Canal, the two Governments have resolved to conclude a convention to these ends, and have accordingly appointed as their plenipotentiaries:

The President of the United States, the Hon. William Jennings Bryan, Secretary of State; and

The President of Nicaragua, Señor General Don Emiliano Chamorro, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the United States:

Who, having exhibited to each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

ARTICLE I. The Government of Nicaragua grants in perpetuity to the Government of the United States, forever free from all taxation or other public charge, the exclusive proprietary rights necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the great Lake of Nicaragua or by way of any route over Nicaraguan territory, the details of the terms upon which such canal shall be constructed, operated, and maintained to be agreed to by the two Governments whenever the Government of the United States shall notify the Government of Nicaragua of its desire or intention to construct such canal.

ART. II. To enable the Government of the United States to protect the Panama Canal and the proprietary rights granted to the Government of the United States by the foregoing article, and also to enable the Government of the United States to take any measure necessary to the ends contemplated herein, the Government of Nicaragua hereby leases for a term of 99 years to the Government of the United States, the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island; and the Government of Nicaragua further grants to the Government of the United States for a like period of 99 years the right to establish, operate, and

maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select. The Government of the United States shall have the option of renewing for a further term of 99 years the above leases and grants upon the expiration of their respective terms, it being expressly agreed that the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof.

ART. III. In consideration of the foregoing stipulation and for the purposes contemplated by this convention and for the purpose of reducing the present indebtedness of Nicaragua, the Government of the United States shall, upon the date of the exchange of ratification of this convention, pay for the benefit of the Republic of Nicaragua the sum of \$3,000,000 United States gold coin, of the present weight and fineness, to be deposited to the order of the Government of Nicaragua in such bank or banks or with such banking corporation as the Government of the United States may determine, to be applied by Nicaragua upon its indebtedness or other public purposes for the advancement of the welfare of Nicaragua in a manner to be determined by the two high contracting parties, all such disbursements to be made by orders drawn by the Minister of Finance of the Republic of Nicaragua and approved by the Secretary of State of the United States or by such person as he may designate.

ART. IV. This convention shall be ratified by the high contracting parties in accordance with their respective laws, and the ratifications thereof shall be exchanged at Washington as soon as possible.

In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereunto their seals.

Done at Washington, in duplicate, in the English and Spanish languages, on the 5th day of August, in the year 1914.

WILLIAM JENNINGS BRYAN. [SEAL.]
EMILIANO CHAMORRO. [SEAL.]

SECTION X

That as soon as the ratification of the Bryan-Chamorro Treaty by the United States Senate appeared in the *Congressional Record*, the Costa Rican Legation at Washington gave careful study to the document, and, having become convinced that its contents were notoriously contradictory of the unquestionable rights of Costa Rica established in the Cañas-Jerez Treaty, the Cleveland Award and the Central American Treaty of Washington, hastened to lay before the North American Foreign Office, under date of the 21st of February, of the present year, a protest, respectful but vigorous, against the action of the Senate—the only step which, at the moment, could have been taken by a country possessed of no forces or defense but the law.

bank of the San Jaun River, from a point three English miles below Castillo Viejo, following the current, as far as the Atlantic Ocean; and that, notwithstanding this, Costa Rica's opinion has not even been consulted in the matter.

(b) *Costa Rica's Assent*

That by virtue of the Cañas-Jerez Treaty and the Cleveland Award, Costa Rica has a *consultative* voice which Nicaragua *must* invoke in order to enter into any agreement that purposes to carry through a project for the construction of a canal on her soil; but that, if by the undertaking the natural rights of Costa Rica should be injured, that voice ceases to be consultative and becomes converted into a *decisive* voice. That is to say, he adds, if the work should portend any injury to Costa Rica, the latter must be brought in as a *party* to the undertaking.

That, even had there been no Cañas-Jerez Treaty or Cleveland Award, the last-stated conclusion would stand, since it is no more than a maxim of equity; but that this time Nicaragua was entirely led astray, and that in spite of the protests of Costa Rica, and against them, she permitted herself to contract alone with the United States in a canal project, thereby unquestionably trampling upon the rights of Costa Rica, which she more than any other was under obligation to safeguard.

That Nicaragua did not even invoke Costa Rica's consultative voice, which was mandatory in this emergency, and that the canal convention, which was guarded so carefully and for so long a time kept secret by the United States and Nicaragua, being now known in all its details, Costa Rica cannot remain quiet and speechless, because that pact, from the moment in which it virtually attacks her rights of navigation of the San Juan River and the integrity of her national territory in that direction, cannot pass unnoticed by Costa Rica, who, armed with her right, maintains that that convention cannot be a law to any party without her acquiescence in such clauses as gravely menace her interests.

(c) *Navigation of Nicaragua's Maritime Waters*

That the Central American Treaty of Washington provides that the merchant vessels of any of the signatory nations shall have equal

rights with the national vessels of each of the other contracting parties when in another's seas, coasts, or ports.

That Nicaragua thus limited, in favor of her sisters of the former Federation of the Center of America — as they in their turn did for her benefit — her enjoyment of her maritime waters, coasts, and ports, for the period of ten years, which period has not yet elapsed and which is prorogable indefinitely from year to year.

That in consequence Nicaragua had not the power to give to the United States for a term of years a valid conveyance of any part of her littoral and waters in the Gulf of Fonseca and of her Corn Islands in the Caribbean Sea, without the obligation stipulated in Article IX of the Treaty of Washington; nor could she kill the said treaty in fact without the concurrence of the will of the other contracting parties.

That an impediment of equal force exists to the sale of the territory that may be occupied or needed by the interoceanic canal whilst that section covers parts of Nicaraguan land or water affected by the Central American Treaty of Washington, since *no one can transfer more rights than he has nor those that he does not possess.*

That by Article IV of the Cañas-Jerez Treaty, Salinas Bay on the Pacific Ocean, and the Bay of San Juan del Norte in the Atlantic, are common to Costa Rica and Nicaragua; and that, in consequence, if the United States should elect the two bays mentioned as the heads or entrances of her canal, the rights of Costa Rica in those bays would vanish down the horizon of history unless right and justice should retain their sway over the conscience of the North American people.

That from the foregoing it is indisputable that in all that relates to a canal across her territory, and, in general, in what concerns the navigation of her waters, Nicaragua's sovereignty is limited by the treaties and conventions cited, which pacts necessarily modify her personality and restrict it within the limits prescribed by her solemn agreements.

That the complainant refrains from specially invoking any principles of international law because of the fact that, Costa Rica's rights being based upon perfect contracts signed with and by Nicaragua, it is to those instruments alone that she must have recourse for the solution of the difference that has arisen, for the contract is the supreme law between the parties whether they be simple individuals or collective political entities. That the case now before the

Court is one of pure civil law, and the legislation of Nicaragua as well as that of Costa Rica and all nations on the globe recognise the commanding status of the contract as the legal bond between the parties. That as between states, the contract is something more than an obligatory tie: "respect for what has been agreed upon, and the faithful fulfillment thereof, are the cornerstones of national honor and there is no defense effective enough to justify an evasion of that canon."

CHAPTER IV

COMPLAINT AND EVIDENCE

It appears:

That with the complaint, the contents of which have been set forth, the attorney for the high party complainant files duly legalized copies of the following documents:

- A. — Attorney's credentials.
- B. — Cañas-Jerez Treaty.
- C. — Esquivel-Román Convention.
- CH. — The Cleveland Award.
- D. — General Treaty of Peace and Friendship between the Republics of Central America.
- E. — Convention creating the Central American Court of Justice.
- F. — Costa Rica's protest lodged with Nicaragua on the 27th of April, 1913.
- G. — Costa Rica's protest lodged with the United States on the 17th of April, 1913.
- H. — Nicaragua's reply of June 12, 1913.
- I. — Inquiry addressed by Costa Rica to Nicaragua July 30, 1913.
- J. — Nicaragua's reply of August 4, following.
- K. — Report on the Foreign Relations of Nicaragua, 1914.
- L. — *La República*, No. 8810, containing Chamorro-Weitzel Treaty signed at Managua, February 8, 1913.
- LL. — Statement of Mr. John N. Popham before the Committee on Foreign Relations of the United States Senate.
- M. — Costa Rica's note of February 2, 1916, to the United States.

- N. — Memorandum of Harry W. Van Dyke, Esquire, before the United States Senate.
- M. — *Congressional Record*, No. 49, of Washington, containing Senate resolution ratifying Bryan-Chamorro Treaty.
- O. — Costa Rica's protest of February 21, 1916, lodged with the United States.
- P. — Note of same day from the United States Legation at San José de Costa Rica to the Costa Rican Government.
- Q. — The Cleveland Award (same as appendix CH).
- R. — Reply of the United States to the protests of Costa Rica.

And, after invoking Article 1st of the *General Treaty of Peace and Amity and of the Convention for the establishment of a Central American Court of Justice*, concluded on the 20th of December, 1907, by the five Central American Republics, for the purpose of showing the jurisdiction of this Court, the attorney for the high party complainant, for the reasons set forth in his complaint, and the resources of diplomacy having been exhausted, prays this Court to render final judgment after due legal procedure in this action which he has brought against the Government of the Nicaraguan Republic, as follows:

First. — That the Bryan-Chamorro Treaty, to which paragraph 15 of the foregoing arguments of fact relates, violates the rights of Costa Rica that were acquired under the Cañas-Jerez Treaty, the Cleveland Award, and the Central American Treaty of Washington, in that —

(a) Costa Rica was not consulted by Nicaragua in order to enter into that convention;

(b) The execution of that pact may deprive Costa Rica of her rights of free navigation in the San Juan River from its outlet in the Atlantic, up stream to within three English miles of Castillo Viejo, and may prevent Costa Rican vessels in the merchant or fiscal service from touching at points on the northern banks of that river along the line indicated;

(c) The execution of the pact may also damage and diminish the Costa Rican shores of the said river along that line, as well as the mouths of the Costa Rican rivers that empty into the San Juan, and the lands about said shores and river mouths;

(d) The execution of the pact may also prejudice the co-ownership of Costa Rica in San Juan del Norte Bay and Salinas Bay, and may nullify that co-ownership entirely;

(e) Because of the potential injuries indicated in (b), (c), and (d) the decisive opinion of Costa Rica is necessary and indispensable to the perfecting of the pact, and that opinion has neither been given or asked for; and

(f) The pact, with regard to the leasing to the United States of Nicaraguan territory for a naval base in the Gulf of Fonseca, and of Great Corn Island and Little Corn Island which Nicaragua possesses in the Caribbean Sea, makes no reservation whatever in favor of Costa Rica, whose vessels possess, in all the maritime waters, coasts and ports of Nicaragua, the right to be treated as national vessels of Nicaragua — an omission which *ipso facto* renders nugatory Article IX of the Central American Treaty of Washington.

Second. — That the violation of Costa Rica's rights in the particulars above set forth, or in any one of them, renders the said Bryan-Chamorro pact void, particularly in view of the fact that when it was signed both contracting parties well knew of Nicaragua's lack of legal capacity to sign unrestrictedly; that is, they knew of Nicaragua's incapacity to sign without holding harmless the rights which Costa Rica possesses in the waters and territories that are involved in the convention, and

Third. — That the acts and omissions set forth in the two preceding points render the said Bryan-Chamorro Treaty null and void and without effect, especially with respect to Costa Rica, and that the Court declare and adjudge said treaty to be null and void and without effect.

Finally, in an interlocutory petition, complainant's attorney prays the Court that, under the authority of Article XVIII of the convention creating this tribunal, in order to prevent damages and conflicts that may perhaps be irreparable later, and pending the final decision in the case, the Court will issue an appropriate decree —

(A) Ordering, with relation to a canal across Nicaraguan territory, and with relation to anything that may interfere generally with the navigation of the waters of that Republic, that the *status quo* of the right that existed in Costa Rica prior to the Bryan-Chamorro Treaty, which gives rise to this action, be maintained, and

(B) Directing that, in view of the urgency of the matter, a communication be sent by telegraph to the Most Excellent, the Governments of Nicaragua and the United States of America, to be followed immediately by confirmation by mail, notifying them, with all due formality, of the institution of this action and of the decree prayed for in the preceding paragraph (A), if, as I venture to hope, my prayer for such precautionary measure shall be acceded to.

SECOND PART

PROCEDURE IN THE CASE AND ANSWER OF THE
HIGH PARTY DEFENDANT*It appears:*

That this Court, in an act signed herein on the 1st day of May, 1916, recognized the Licentiate don Lufs Castro Urefia as the representative of the complainant Government, admitted the complaint presented, notified the Nicaraguan Government and called upon it to answer the complaint within sixty days from the date of notification, ordered that copies of the complaint, evidence, and of the interlocutory act of this Court be also sent, by note, to that Government, decreed the precautionary measure (*medida precautoria*) asked for, and, finally, ordered that this act be notified to the defendant Government and the other signatories of the treaty creating this Court.

It appears:

That the Government of Nicaragua, not having answered the complaint within the term prescribed, the Court, by its act of August 16, last, granted an extension of twenty days as provided in Article XV of the organic convention.

It appears:

That on the 25th of the same month of August, the Court received an official communication dated the 1st of that month, from the Minister of Foreign Relations of Nicaragua, setting forth the following:

That, in acknowledgment of the notification ordered by the Central American Court of Justice in its act of May 1 last, to be given to the Government of Nicaragua, calling upon the latter to answer the complaint brought on the 24th of March by the Government of Costa Rica relating to the conclusion of the Chamorro-Bryan Convention for an option to contract for the opening of an interoceanic canal, the following is submitted:

That the statements contained in the introduction to the complaint have caused much surprise to his Government, for it would seem that they were only made to mislead public opinion by juggling

with the meaning of words or distorting the groundwork of facts to conceal the truth.

That after the opening of the complaint, one reads that the Republic of Costa Rica, in the action against the Government of Nicaragua, is brought before the Central American Court of Justice on the grounds that a convention was concluded by the latter with the Republic of the United States *for the sale of the San Juan River and other purposes*. That the language in the convention is clear and explicit: absolutely nothing, the Minister says, refers to a sale; an option only is stipulated for the conclusion of a treaty at the appropriate time.

That it is impossible even to know where and when it will be arranged to build the canal — whether it will be built on the Costa Rican frontier or over some other course distant therefrom.

That when the matter shall have been studied, and all the advantages discussed and weighed in order to select, locate, and construct the waterway, then, and then only, can we proceed to enter into the canal treaty or contract.

That, meanwhile, the idea of a sale of the San Juan River, attributed to the Chamorro-Bryan Convention, is without foundation, and is, furthermore, offensive and harmful.

That, wishing to be understood by the foregoing as implying nothing more than a demonstration of courtesy towards this Court, he is constrained also to express the surprise of his Government in noting that the Central American Court of Justice should have admitted the complaint, the incompetency of the Court being so manifest, as he then undertakes to show: The convention that created the Court, he said, is a fundamental code. It cannot be ignored, and the Court must subject itself to the provisions of that convention or its proceedings will be null and void. That in the present case the question must first be asked, "What is the basis of the complaint, what gives rise to the action?" Is it the Chamorro-Weitzel Treaty or the Chamorro-Bryan Treaty? The first pact never went into effect, and, therefore, must be dismissed from the discussion: had it given occasion for a complaint based on an allegation by Costa Rica that it violated her rights — and this the Nicaraguan Government does not admit — that treaty stands in the category of an instrument of no value and therefore cannot be made the subject of consideration.

That the complaint, then can only have been inspired by the Chamorro-Bryan Treaty; but that with respect to that pact, the party complainant confesses that it had not initiated, much less pursued and brought to an end, any steps through diplomatic channels. How, then, he continues, could it be said that it was impossible to reach a settlement between the Foreign Offices of the two countries if not a single effort thereto was made — a requisite *sine qua non* (Article 1 of the convention) — so that the claim could be established, once tentative diplomatic negotiations had been exhausted?

That this being so, it is idle to attempt deductions, since they could be based only on conjecture. The truth of the allegations of fact must be demonstrated by *acts* or other classes of authentic documents (Article XVII of the Rules of the Court); it is useless to say that the complaint relates to a similar convention. The rules prescribed under the authority of a treaty require proofs, not mere pretext that may be availed of by one party to elude the obligation imposed. That as those proofs do not exist, nothing has been adduced to establish the competency of the Central American Court of Justice. That tribunal cannot hold itself above the constituted law; it bears no legal mission in this affair.

That, even on the supposition that the Chamorro-Bryan Treaty were not similar, but identical, in language with the Chamorro-Weitzel pact, the latter not having had any legal existence, is relegated to the category of a mere rejected project, and so true is this that it can be stated in all veraciousness that the effects produced with respect to Nicaragua and the United States by the Chamorro-Bryan pact arose or sprang into being from the exchange of ratifications of the latter. That, consequently, what should be, and must be, proven is that which has relation to the Chamorro-Bryan Treaty.

That the Central American Court of Justice could not, and cannot, legally prescind from that legal requirement without overstepping its powers, or, what amounts to the same thing, without bringing about the absolute nullity of all its acts; and that everything it shall decide, if it should reach the stage of decision, will be absolutely null and void for want of jurisdiction.

His Excellency the Nicaraguan Minister of Foreign Relations then refutes the votes of four of the members of the tribunal that were cast for the admission of the complaint; and afterwards he alleged that the other important element that must be considered in this

matter — and this throws into bold relief the incompetency of the Central American Court of Justice to take cognizance of the complaint — is that which is prayed in the complaint itself: "That therein, as though it were a matter that arose out of the relations between two states signatory to the convention that created this Court, the Court is requested to render a decision in a matter which in no way, and in none of its points, could be submitted to its cognizance." "We bid you enter," says the party complainant to the Central American Court of Justice, "we bid you enter upon a forbidden road which no one has opened to you; plunge your scythe into another's wheat; break an agreement signed by one who has entrusted to you no mission to take cognizance of his affairs." This and nothing else, he says, is what is asked when a decision in the following terms is prayed for:

That the violation of the rights of Costa Rica in the particulars heretofore imputed, or by any one of them considered by itself alone, nullifies the said Chamorro-Bryan pact, particularly because both contracting parties knew of Nicaragua's relative incapacity to execute the pact without restrictions — that is, without safeguarding the rights Costa Rica possesses in the waters and lands involved in the convention.

That, even limiting the viewpoint to the simple approval of a treaty by the Nicaraguan Congress — an approval given under the authority of the powers conferred upon that body by the political constitution — such pact could not come under the jurisdiction of the Central American Court, and even less a decision as to the validity of that act, emanating as it did from a governmental power exercising the sovereignty of the Republic. That the hypothesis might perhaps be admitted that sometimes the right exists to complain because of a violation, or for damages, or on some similar ground, but never could the legal impossibility of nullification of sovereignty be asked, much less the nullification of those acts in which a third high contracting party participates.

After other observations relating to this point, His Excellency the Nicaraguan Minister of Foreign Relations sets forth that his "Government believes, and, through him, so declares, that it is under no obligation to reply to the complaint of the Costa Rican Government because it cannot admit, even conditionally, the competency of the Court to take cognizance of, and to decide, that complaint."

He sets up the incompetency and utter lack of the Central American Court of justice, as the sole point that is to be determined in the final decision, and continues: "That not for a moment could Nicaragua consider — except for the purpose of rejecting them — the baseless statements, nor the proceeding attacking her sovereignty and dignity." And finally, "that if the Court insists upon taking cognizance of the cause in violation of the provisions of the General Treaty of Peace and Amity and the convention that brought it into existence, the Government of Nicaragua protests in most solemn manner that Nicaragua has proceeded within her rights, that the Central American Court is without jurisdiction, and, in the event of a decision adverse to her, Nicaragua declares that she will be unable to abide by it."

It appears:

That the Court, in view of the answer made by the Government of Nicaragua, passed an act, on the 31st of August last, in which it held as having been acknowledged, the extension of time that had been allowed for the answer to the complaint, and that consequently the new term of thirty days granted in the act of the 16th of the same month of August was extinguished; that the high party defendant having failed in its answer to designate any person or office in this city to receive notices, such notices are to be considered, with respect to the defendant, as tacitly waived in conformity with Articles 59 and 60 of the Rules of Procedure, and all notices are to be considered as effective after the expiration of forty-eight hours from the time the acts they refer to have been passed; that the cause was then ready to be taken under consideration, and that, for presenting the final arguments of the high parties, the 11th day of the present month (September) was set for the hearing.

It appears:

That the attorneys, Don Luis Castro Urefia and Don José Astúa Aguilar (the latter appointed on the 7th of the said month as representative of the Government of Costa Rica and associate counsel with the Licentiate Castro Urefia), appeared at the hearing set and submitted their arguments in support of the interests of the high party complainant. The representative, Astúa Aguilar, confined

himself in his argument of the prayers of the high party complainant, to the following:

That the indisputable rights of Costa Rica established and confirmed in the Cañas-Jerez Treaty, the Cleveland Award, and the General Treaty of Peace and Amity of Washington have been violated by the high party defendant in the Bryan-Chamorro Treaty, and that according to the text of the said conventions and arbitral award, that defendant was legally incapable of concluding that pact without the intervention and consent of my Government.

It appears:

That, at the session held by this Court on the 22d of this month, the questions submitted were fully discussed and the points contained in the questionnaire heretofore approved were voted upon in the manner set forth in the act passed at that session, which act reads as follows:

ACT RECORDING THE VOTES OF THE COURT IN THE CASE

The Central American Court of Justice, San José de Costa Rica, at ten o'clock on the night of the 22d of September, nineteen hundred and sixteen.

The Court, having concluded its deliberations preparatory to a final decision of the action brought by the Government of Costa Rica against the Government of Nicaragua, proceeded to take a vote on the fourteen points comprised in the questionnaire heretofore approved and accepted for consideration, with the following result:

First Question. — (Submitted by the high party defendant, as a peremptory exception.) Has the Court jurisdiction and is it competent?

This exception was considered notwithstanding the decision rendered herein on the 1st of May last, and all the judges answered in the affirmative.

Second Question. — In the opinion of the Court are the two diplomatic instruments known by the names of the Chamorro-Weitzel and Bryan-Chamorro Treaties two aspects of the same international transaction, the object of which is the construction of an interoceanic canal, within the purview of this proceeding?

Answered affirmatively by the Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Third Question. — Is it the opinion of the Court that both negotiations, relating to an interoceanic canal, were entered into and concluded by the Government of Nicaragua without official notice to Costa Rica?

Answered affirmatively by all of the judges.

Fourth Question. — Is it the opinion of the Court that the Government of Costa Rica pursued all reasonable efforts, through diplomatic channels, to effect an adjustment?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Fifth Question. — Is it the duty of the Court, in view of the foregoing questions and decisions thereof, to declare the competency and jurisdiction of this Court to take cognizance of the complaint?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Sixth Question. — Is it the duty of the Court to declare its competency to take cognizance of and decide this cause on the merits?

Answered affirmatively by all of the judges, Judge Gutiérrez Navas concurring, however, only in so far as that the merits relate to differences between the Government of Costa Rica and the Government of Nicaragua.

Seventh Question. — Is the Court in duty bound to declare its competency to take cognizance of, and decide, this cause notwithstanding it relates to contractual interests of a nation not subject to the jurisdiction of this Court?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Eighth Question. — Was the Government of Nicaragua, by virtue of the eighth article of the Cañas-Jerez Treaty, under the obligation to consult, in advance, the opinion of the Government of Costa Rica respecting injuries that might result to the latter in connection with the concessions contained in the Bryan-Chamorro Treaty?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Ninth Question. — In the Bryan-Chamorro Treaty does Costa Rica possess the right to be heard decisively respecting the concession for a canal by way of the San Juan River and the Great Lake Nicaragua?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas, who maintained that no evidence on this point appeared in the case.

Tenth Question. — In the Bryan-Chamorro Treaty does Costa Rica possess the right to be heard decisively respecting the canal concession in connection with any other point in Nicaraguan territory, provided the rights of Costa Rica specified in Point 10 of the Cleveland Award are not affected?

Answered negatively by all of the judges.

Eleventh Question. — Must it be taken as proven that in the said Bryan-Chamorro Treaty nothing is stipulated in protection of the rights of Costa Rica?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas, who stated that in his opinion such stipulation was not necessary since the rights of a third party, which had not taken part in the treaty, nor assented to its negotiation, could not be affected; and that his opinion is based upon the doctrine of generality set up by the text writers on international law.

Twelfth Question. — Is it the duty of the Court to hold that the Bryan-Chamorro Treaty violated Costa Rica's rights to free navigation by the cession of a naval base in Fonseca Bay, and the cession of the islands known as Great Corn Island and Little Corn Island?

The Court, in view of the fact that it has agreed to the revision of the previous decision, accepted the proposition of Judge Oreamuno to substitute for the question immediately preceding, the following:

Shall it be understood that the Bryan-Chamorro Treaty violates the rights accorded to Costa Rica by Article Nine of the Treaty of Peace and Amity, of 1907?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Thirteenth Question. — Is it, consequently, the duty of the Court to hold and decide that the treaty that gives occasion for this complaint violates provisions of the Cañas-Jerez Boundary Treaty, the Cleveland Award, and the Treaty of Peace and Amity signed at Washington in 1907?

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Fourteenth Question. — Can this Court decide the prayers contained in the second and third points of the complaint?

Answered negatively by all of the judges.

The cause is, therefore, decided as follows:

First. — The Court declares itself competent to decide the complaint presented.

Second. — The Court declares that the Government of Nicaragua has violated, to the injury of Costa Rica, the rights conferred upon the latter by the Cañas-Jerez Treaty of Limits of April 15, 1858, the Cleveland Award of March 22, 1888, and the Central American Treaty of Peace and Amity of December 20, 1907.

Third. — Respecting the prayer for the nullification of the Bryan-Chamorro Treaty, contained in the complaint, this Court can make no declaration whatsoever, because of the fact that the Government of the United States of North America is not subject to the jurisdiction of this Court.

THIRD PART

EXAMINATION OF FACTS AND LAW

CHAPTER I

CONCERNING THE PEREMPTORY EXCEPTION AS TO THE JURISDICTION OF THE COURT

Whereas:

The Government of Nicaragua, in its communication of August 1, last, answering the notification of the presentation of the complaint, having interposed a peremptory exception to the jurisdiction of the Court, and having also addressed itself to that point in its telegraphic despatches of the 1st and 26th of April, and 7th and 9th of Sep-

tember, instant, it is the duty of the Court to analyze the fundamentals of that exception and the evidence in support thereof, as well as the legal dispositions that govern the point, in order to determine whether or not this Court has the power to take cognizance of the cause.

Whereas:

It appears from the telegraphic despatches and the answer to the notification as to the complaint that the Nicaraguan Government rests its denial of the jurisdiction and competency of this Court on three grounds, to wit:

First. — That the negotiations with the Government of the United States concerning the interoceanic canal were conducted in the exercise of Nicaragua's unquestionable rights of sovereignty;

Second. — That she conducted those negotiations with a nation foreign to the jurisdiction of this Court, and

Third. — That although the Government of Costa Rica took certain diplomatic steps when the Chamorro-Weitzel Treaty was concluded — which instrument never went into effect — on the other hand it took absolutely no steps before the Nicaraguan Foreign Office in connection with the Chamorro-Bryan Treaty which gave rise to the present complaint, and that, consequently, the necessary prerequisite to the assumption of jurisdiction by this Court, prescribed by the organic convention, has not been fulfilled by the complainant Government.

Whereas:

With regard to the first of the foregoing allegations it is sufficient to observe that Article I of the convention that created this Court, and which constitutes its fundamental code, does not exclude from its cognizance any class of questions or differences that may arise between Central American states, whatever may be their origin and whatever their nature. Nothing exists to limit the jurisdiction of the Court by reason of the substance of the question in dispute, and it is, therefore, obvious that no Central American nation can exempt itself from the obligation to answer before this Court all actions brought by the other signatories to that convention, on the pretext that the injuries complained of are based upon acts performed in the exercise of sovereignty.

Whereas:

With regard to the allegation that the transaction out of which this complaint arose was concluded with a Power foreign to the jurisdiction of the Court, and that, consequently, the Court cannot decide the action brought by the Government of Costa Rica without entering a field foreign to it, and, therefore, forbidden ground, the Court is of opinion that, were that allegation sufficient to prevent the exercise of its function "to guarantee efficaciously the rights of the Central American Republics and maintain inalterably peace and harmony in their relations without being obliged to resort in any case to the employment of force"—the mission entrusted to it by the organic convention—a considerable number of controversies could arise amongst us that would have no other possible solution than through the resort to arms, and thus the most important element of finality sought to be fixed by the signatory states in instituting the Court, would be rendered nugatory. The Court can unquestionably carry out its functions without venturing upon forbidden ground, limiting itself, however, as in duty it is bound to do, to a determination of the juristic relations existing between Central American states engaged in controversy and to a declaration of the law with respect to them: but refraining absolutely from cognizance conditions of fact and law which their acts have created with respect to other nations not under the jurisdiction of this Court.

Whereas:

With regard to the allegation by the high party defendant that this Court is incompetent because "there is no consistent evidence, in acts or other classes of authentic documents, that, in order that the complaint might be admitted, the high party complainant had initiated much less pursued and exhausted without reaching settlement the diplomatic steps required by Article I of the convention creating the Court and its Seventeenth Rule," this Court, for its purposes in reaching a decision on this point, has before it the following facts:

First. It appears in the record of this case, according to the statement of the high party complainant, that in April, 1913, it received private information that the Legislative Power of the Republic of Nicaragua had secretly approved a treaty, concluded also

in secrecy, between the Government of that Republic and the Government of the United States of America relating to the opening of an interoceanic canal through Nicaraguan territory, and that the Government of Costa Rica, acting on this information, instructed its diplomatic representatives at Managua and Washington to lodge protests against the conclusion of a convention which it conceived to be in violation of the rights vested in it by existing treaties between Costa Rica and Nicaragua and also by the Cleveland Award of March 22, 1888; and that, according to the evidence contained in the record, such protests were duly presented.

Second. — That the Government of Nicaragua, in its note of June 12, 1913, replied to the protest of Costa Rica, invoking the prerogatives of its sovereignty in justification of its conclusion of the treaty referred to and the necessity, for diplomatic reasons, of maintaining secrecy regarding the contents of that pact.

Third. — That the Government of Costa Rica, upon noting the text of the treaty as it appeared in a newspaper of this capital — which text was said to have been the same as that of the pact that prompted the protests referred to — repeated its demands upon the Nicaraguan Foreign Office and the latter replied insisting upon the necessity of maintaining secrecy regarding its diplomatic agreement with the United States of America; and that, with respect to its contents, it was impossible to make any statements whatever because the agreement had not yet been perfected.

Fourth. — That, having had notice that, although the treaty then in question had been withdrawn from the United States Senate, a new canal treaty was already under consideration by that body for ratification, and, considering, thereupon, that the road to a direct settlement with the Nicaraguan Foreign Office was already closed, the Government of Costa Rica undertook, before the Foreign Office of the United States of America and before the Senate itself, certain steps calculated to prevent the perfecting of the treaty; and that, finally, the pact received the supreme approval of the American Senate on the 18th of February of the present year.

Fifth. — That the high party defendant, in asserting that the necessary steps between the Foreign Offices had not been previously taken, seized upon the circumstance that the negotiations undertaken before it by the Costa Rican Foreign Office were prompted by the conclusion of the Chamorro-Weitzel Treaty which never reached the

stage of perfection, and not by the Bryan-Chamorro pact, which is the one that brought about the presentation of the complaint.

The calm examination this Court has made of the foregoing allegations enables it to avoid passing over unnoticed the dialectic error into which the High Party Defendant has fallen in mistaking the basis of the complaint; the Government of Costa Rica has not grounded its action specifically on the name by which the pact that gave rise to the complaint is known, but, instead, on the point that said pact refers to concessions for the construction of an interoceanic canal across Nicaraguan territory, with respect to which concessions it has consistently persisted in its protests ever since the year 1913.

This Court holds that it cannot accept as sufficient to support the exception respecting its competency to try this case the argument of the Nicaraguan Government that the Chamorro-Weitzel and Chamorro-Bryan treaties are two distinct negotiations and that Costa Rica's opposition to the first is of no avail against the second, because the negotiations being identical in their ultimate purpose to bring about the construction of an interoceanic canal—which is the desideratum against which, fundamentally, Costa Rica is complaining—it is impossible to avoid consideration of both negotiations as stages of the same transaction, for the arguments based exclusively on sovereignty and the necessity to safeguard a diplomatic secret, wherein the Nicaraguan Foreign Office takes refuge in its answer to the protests lodged by the Government of Costa Rica against the first pact, necessarily govern in respect to the other; and, therefore, the Court must be, and is, of the opinion that the Costa Rican Government did exhaust the requisite foreign office steps available to it for the purpose of reaching a settlement with the Republic of Nicaragua relating to the negotiations undertaken by the latter with the Government of the United States with the object of procuring the construction of an interoceanic canal; and, in view of the round affirmation of the Nicaraguan Foreign Office that its negotiations were covered by the attributes of national sovereignty, any new undertaking in the premises by the Costa Rican Government could with much more reason have been logically looked upon as futile.

The Court is furthermore of the opinion that it cannot under any theory admit as a correct interpretation the allegation that the final requisite of Article I of the Convention that gave life to this Court should be understood in the sense that the high parties here contend-

ing are under the obligation to persist in steps which, besides being futile with respect to reaching the conclusion of a settlement, are subversive of their dignity and convenience.

Whereas:

The Chamorro-Weitzel and Bryan-Chamorro Treaties having, as above set forth, been held by this Court to be two stages in the same diplomatic negotiation, the evidence regarding the unsuccessful exhausting of foreign office proceedings looking to a settlement, which is required by the convention and the Rules of Court in order to establish the competency of this tribunal, and which the high party defendant denies, is constituted by the notes addressed by the Nicaraguan Foreign Office to the diplomatic representative of Costa Rica at Managua on the 12th of June and the 4th of August, 1913, and these documents are authentic.

Whereas:

The allegations on which the high party defendant bases its peremptory exception have been, and are hereby, rejected; and since this Court is the sole power on which, by the will of the nations that created it, has been conferred the right to decide, in each case, whether all possible proper steps looking to an amicable settlement have in fact been exhausted, as well in conformity with the precept contained in Article XXI of the same convention that empowers it to render judgment on the points of fact brought out, according to its free opinion, as in conformity with the power to determine its own competency, conferred upon it by Article XXII, wherein is manifested the will of the nations that subscribed to that fundamental code of this Court that its competency shall not be submitted to the arbitrament of the parties in controversy, this Court must make the declarations that logically develop, to wit, that the high party complainant has fulfilled the sole requisite prescribed by Article I of the said convention in order that the complaint may be admitted, and that as the peremptory exception interposed by the high party defendant is without merit, this Court is competent to decide the complaint brought before it.

CHAPTER II

ANALYSIS OF THE ACTION

Whereas:

The Court has studied, in the first place, the legal construction of the Bryan-Chamorro Treaty in order to ascertain its true international bearing, as well in its reference to the contractual relations between the high signatory parties as with respect to the situation in which third parties in interest, foreign to that pact, find themselves.

The Government of Nicaragua, according to Article I of that instrument, granted in perpetuity to the United States, forever free from all imposts or other public charge, the rights of exclusive ownership necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the Great Lake of Nicaragua, or by any other route in Nicaraguan territory. The details of the terms on which the canal shall be constructed, operated, and maintained are to be agreed upon by the two Governments whenever the Government of the United States shall notify the Government of Nicaragua of its desire or intention to construct such canal.

With variations of form and attenuations of style, but with the same capital thought always predominating, the withdrawn Chamorro-Weitzel pact, which this Court holds to be the first stage in the diplomatic negotiation that culminated in the Bryan-Chamorro Treaty, provides in Article I as follows:

The Government of Nicaragua hereby cedes in perpetuity to the Government of the United States the unincumbered and exclusive rights necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the Great Lake of Nicaragua, or by any other route in Nicaraguan territory; the details of the terms on which such canal shall be constructed, operated, and maintained to be fixed by mutual understanding between the two Governments whenever the construction of the said canal shall be decided upon.

To facilitate a logical interpretation of their articles both documents are pagged and arranged alike; they give birth to the same idea, and the same purpose is embodied in each. One uses the word "cedes" and the other the word "grants"; the phrase "exclusive right" was changed to "rights of exclusive ownership," and "functioning" to "service" [to translate literally the Spanish words "*fun-*

cionamiento" and "*servicio*" which are here given in the translator's version as "operation" and "maintenance" in his rendition of both Spanish texts] and variations appear in the preamble and in other parts of the canal stipulations. If any real innovation is to be noted in the later pact it would be that which leaves the construction of the canal to the free volition of the Government of the United States, whereas the first draft of a convention did not contain such an explicit right, but, on the contrary, left the details and terms of the undertaking to the mutual understanding of the two Governments "whenever the construction of the canal shall be decided upon," and remained silent as to whether, when that time arrived, the will of either or both should be necessary.

With these historic antecedents essential as they are to a precise establishment of the international legal effect of the first article of the pact known as the Bryan-Chamorro Treaty, it is possible to approach with intelligence a solution of the problem: "Is a simple option conveyed or is a sale consummated?" The doubt arises from the divergence on the opinions of the high parties litigant. On the one hand, counsel for the Costa Rican Government maintain that the contract constitutes a perfect sale, whereas, His Excellency the Nicaraguan Minister of Foreign Relations, in his communications to this Court, upholds the theory that a simple option was stipulated, calling for consummation in the future, when the preliminary studies for the location of the canal shall have been made and agreement shall have been reached as to where and when it would be most advantageous to begin operations.

There can be no doubt whatever that the Bryan-Chamorro Treaty effects a perfect sale of the ownership rights necessary for the construction of an interoceanic canal by way of the San Juan River and the Great Lake of Nicaragua, or by any other route over Nicaraguan territory. "To grant in perpetuity" is to alienate, to transfer ownership; it is a full manifestation of the will to divest with complete renunciation of all the incidents and elements that define and constitute ownership. Here also is present the *animus adquirendum* on the part of the purchaser who undertakes to pay the price of the sale. The indispensable legal conditions exist, therefore, to sustain the fact that the Bryan-Chamorro Treaty constitutes a sale, and, further, a conveyance of title and ownership with a certain and determined object, at least in relation to the real rights which Nica-

aragua alienates in the San Juan River and the Great Lake of Nicaragua in connection with the construction of an interoceanic canal.

The concept of an *option*, on the other hand, involves a wholly different idea. Here there is no actual alienation of ownership, but a mere expectancy, realizable only upon the fulfillment of certain stipulated circumstances and conditions. And in the Bryan-Chamorro Treaty, which is of an onerous and commutative character, there is a perfect obligation on the part of the Nicaraguan Government, subject simply to the determination of the United States Government as to the practical execution of the contract. The conveyance might be described as an alternative alienation, but not an option in the legal sense of the word. To concrete: by that diplomatic contract, Nicaragua alienated once and forever the necessary rights for the construction of an interoceanic canal by way of the San Juan River and Great Lake of Nicaragua or by any other route whatever through Nicaraguan territory, and she thereby made it impossible to recover those rights for herself or to make them the subject of other contracts.

Whereas:

With respect to the legal effects of the treaty in so far as they concern Costa Rica, a third party that took no part in its negotiation, consideration must be given to the situation existing between that country and Nicaragua in the sphere of territorial rights prior to the date on which the canal treaty was raised to the category of a law for the high signatory parties, in order to judge the full effect and scope of the violation of rights that is the subject of Costa Rica's action before this Court. The Cañas-Jerez Treaty, a perfectly valid contract still in force, contains, in the concrete, the following stipulations fixing the rights of both Republics in the said river:

ART. 6. The Republic of Nicaragua shall have exclusive dominion and the highest sovereignty over the waters of the San Juan River from their issue out of the lake to their discharge into the Atlantic; but the Republic of Costa Rica shall have in those waters perpetual rights of free navigation from the said mouth of the river up to a point three English miles below Castillo Viejo, for purposes of commerce, whether with Nicaragua or with the interior of Costa Rica, over the San Carlos or Sarapiquí Rivers or any other course starting from the part which has been established as belonging to that Republic on the banks of the San Juan. The vessels of either country may touch at any part of the banks of the river, where the navigation is common without paying any dues except such as may be established by agreement between the two Governments.

As a result of concessions granted by Nicaragua for the construction of a canal, against the opposition of Costa Rica, the boundary disputes were revived and brought about the arbitration by President Cleveland, who, on the 22d of March, 1888, rendered his award interpreting and revalidating the Cañas-Jerez Treaty. That pact now stands as authority for the solution of all pending doubts respecting boundaries and the canal in question.

The award, after holding that the Cañas-Jerez Treaty was in full force and effect, declared that the Republic of Costa Rica "has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded her in said article, or as may be necessary to the protection of said enjoyment."

These two public documents, to which both high parties litigant accord full legal effect and probative value, serve as a guide to this Court in establishing the following propositions:

(a) The Republic of Nicaragua possesses exclusively the ownership and highest sovereignty over the San Juan River throughout its entire course; that is to say, she exercises over it the rights of ownership and it forms a part of the national territory subject to her sovereignty.

(b) That right, however, is not absolute, but is subject to the restrictions imposed by the treaty itself, to wit: First, the Bay of San Juan del Norte and Salinas Bay are common to the two Republics, and, consequently, the legal principle of co-ownership is perpetuated as to both those terminal points of a possible canal; second, Costa Rica, equally with Nicaragua, is under the obligation to guard and defend the river in the event of foreign aggression — a stipulation that demonstrates effectively the high degree of solidarity in the moral and material interests of the two peoples entertained by the negotiators; and, third, Costa Rica possesses in the San Juan River, for purposes of commerce, permanent rights of free navigation from its outlet as far up as three miles below Castillo Viejo, and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common.

It is clear, therefore, that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute or

unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica — the more so if it is considered that such rights, exercised for revenue and defensive purposes, are, according to the opinion of statesmen, usually confounded in their development with the sovereign powers of the *imperium*; such a concession is equivalent to a real right of use, perpetual and unalterable, that establishes the Republic of Costa Rica in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory.

By virtue of the decisions contained in the Cleveland Award, and what is held therein relating to the territorial boundaries, the following points are evident:

(a) The perfect validity of the Cañas-Jerez Treaty, which validity is given by that instrument, if possible, even greater moral and legal vigor;

(b) The proposition that the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes — an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the San Juan River because navigation with vessels of war, aside from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty;

(c) The physical demarcation of the divisionary line between the two countries on the Atlantic side, as a means to a solution of the doubtful points of interpretation raised by the Republic of Nicaragua.

In relation to the possible construction of an interoceanic canal the Cañas-Jerez Treaty and the Cleveland Award specify the following categorical stipulations, and on them this Court will rest its decision, since they are absolutely pertinent to the case before it:

Article VIII of the Cañas-Jerez Treaty provides:

If the contracts for canalization or transit entered into before the Nicaraguan Government had knowledge of this convention should for any cause cease to be in force, Nicaragua agrees not to conclude any others relating to the objects above stated without first hearing the opinion of the Costa Rican Government respecting the disadvantages that may result to the two countries, provided that opinion be given within thirty days after the request therefor shall have been received, in case that

the Nicaraguan Government should indicate that a decision is urgent; and in the event that the enterprise should cause no injury to the natural rights of Costa Rica, *that opinion shall be advisory.*

Article X of the Cleveland Award provides:

The Republic of Nicaragua remains bound not to make any grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica, as provided in Article VIII of the Treaty of Limits of the 15th day of April, one thousand eight hundred and fifty-eight. The natural rights of the Republic of Costa Rica alluded to in the said stipulation are the rights which, in view of the boundaries fixed by the said Treaty of Limits, she possesses in the soil thereby recognized as belonging exclusively to her; the rights which she possesses in the harbors of San Juan del Norte and Salinas Bay; and the rights which she possesses in so much of the River San Juan as lies more than three English miles below Castillo Viejo, measuring from the exterior fortifications of the said castle as the same existed in the year 1858; *and perhaps other rights* not here particularly specified. These rights are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded; where there is an encroachment upon either of the said harbors injurious to Costa Rica; or where there is such an obstruction or deviation of the River San Juan as to destroy or seriously impair the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same.

These concomitant dispositions restrict Nicaragua's right to dispose freely of her ownership over the waters of the San Juan River, since it is indispensable to the legality of the contractual act first to consult the decisive opinion of Costa Rica in consideration of the fact that both Republics maintain perfect rights in that river, which, since ancient times, has been looked upon as the artery that would some day be availed of to give life to the long projected canal.

Whereas:

Examining the existing *statu juris* between the Republics of Costa Rica and Nicaragua in the light of the clear and positive provisions of the Cañas-Jerez Treaty and the Cleveland Award, declaration will now be made as to how the Bryan-Chamorro Treaty affects that legal status.

That treaty was concluded without official notice to the Government of Costa Rica, notwithstanding a solemn agreement imposed upon Nicaragua, the unescapable obligation to consult the opinion of the former before granting any concession for an interoceanic canal. This solemn agreement was enacted by the Cañas-Jerez

Treaty hereinbefore reproduced in its pertinent parts, in the preceding whereas; and it was confirmed by the arbitral award of President Cleveland as shown in its declaratory paragraph No. 10, also reproduced in the same whereas.

Costa Rica should have been consulted; and her voice could have been consultative or decisive as the case may be. If the concession is one that violates her "natural rights," "it would seem that her consent is necessary," says the Cleveland Award; and, in the event, continues the award, "that the concession does not affect such rights, her voice must be purely consultative."

In the case of the Bryan-Chamorro Treaty, the essential consultation was not had. This Court unanimously decided this point, supported by the Nicaraguan Government's own statement, wherein it explained that failure by attributing to itself sufficient power and authority to execute concessions of that kind in the exercise of its sovereignty unrestricted within its proper jurisdictional limits.

The Court, however, entertains a different opinion in deciding this point. The canal concession executed in favor of the Government of the United States of North America has two aspects: the alienation of the rights necessary for the construction of an inter-oceanic canal by way of the San Juan River, and the power conferred upon the purchaser to locate that passageway in any other point in Nicaraguan territory. In the first case Costa Rica ought to have been consulted and her voice would have been decisive in character, because any concession covering the San Juan River involves a violation of her "natural rights" specified in paragraph 10 of the Cleveland Award.

Costa Rica possesses undisputed title to the right bank of the river, to the land situated within her jurisdictional limits; she has joint ownership in the ports of San Juan del Norte and in Salinas Bay; she possesses the contractual right of perpetual navigation in the river, beginning at a point three miles below Castillo Viejo, accompanied by the full privilege of transit and commerce, and Nicaragua is impressed with the duty not to interfere with navigation, but, on the contrary, to keep the course of the river open; Costa Rica enjoys also the right to moor her vessels on both banks throughout the entire zone in which navigation is common, and the rights involved in guarding and defense "with all means within her reach."

The Bryan-Chamorro concession, in prescribing the rights necessary for the construction of a canal by way of the San Juan River, ignored the legitimate rights of the high party complainant, since the realization of that work over that route necessarily implies the occupation of the Costa Rican shore or the consequent inundation of her territory as well as the use of the Costa Rican affluents, etc., and in case, for canal purposes, the waters of the San Juan River should be diverted, Costa Rica's right to navigate that river and its affluents wherever Costa Rica enjoys the joint rights above specified, would be rendered nugatory. At least that is the conviction that flows from the letter and spirit of the Cañas-Jerez Treaty and the Cleveland Award when those instruments subordinate all concessions of that kind to the duty of consulting and considering the decisive opinion of Costa Rica.

Without doubt the fact that it was practically impossible to construct an interoceanic canal by way of the San Juan River without affecting Costa Rican lands and waters, which, should they serve as the site of the great undertaking, would have to be respected, weighed heavily in the minds of the illustrious negotiators of 1858 and in that of the honorable arbitrator. Perhaps also the consideration had weight that Costa Rica possessed the right to demand due compensation for the use of elements subject to her jurisdictional power. And, finally, perhaps they were swayed by considerations of a moral and political order, consistent in that, aside from material interests, the two Republics are tightly bound together in their past, their present, and their future — to say nothing of other reasons of greater import — because united by nature in the enjoyment of such an important fluvial highway.

This explains the fact that that Article VIII of the Cañas-Jerez Treaty stipulates that the opinion of the Costa Rican Government shall be consulted "respecting the inconveniences which the undertaking may occasion to the two countries." That pact does not concede to Costa Rica the right to be consulted solely in regard to her own exclusive interests; the high prerogative is conferred to point out the inconveniences that the canal concession might occasion to either country. The moral accord that this signifies confirms the judicial opinion of the Court respecting the conclusion that the natural rights of Costa Rica are affected by the alienation of the inherent power to construct an interoceanic canal by way of the San

Juan River. In regard to the power conferred on the Government of the United States to locate the canal route at any other point in Nacaraguan territory, Costa Rica should also be consulted, but its opinion in such case would be only consultative in character. That prerogative having been conceded by way of homage to high political and moral interests, the opinion of Costa Rica, in this case, possesses only the character of a simple consultative opinion.

In order to penetrate into the spirit and extent of that right, one must look back to the period in which the Cañas-Jerez Boundary Treaty was concluded. A filibustering invasion of Nicaraguan territory had just taken place that profoundly stirred Costa Rica, and the latter aided in the reestablishment of constitutional order in the neighboring Republic.

It is natural, therefore, that, there being a strong desire for union, they should link together their destinies by means of such an important work—a work that will set new standards for their future.

The diplomatic history of the two countries, as set forth in public documents, shows that repeatedly in the past the Republic of Nicaragua complied with the obligation to consult the Costa Rican Government, thereby giving occasion for an exchange of impressions and ideas relating to canal concessions. Thus, when in 1868 Nicaragua's representative signed at Paris a canal contract with Mr. Miguel Chevalier, it was especially stated in the instrument that "if the Republic of Costa Rica should decline to adhere, the present contract by that fact shall become a nullity." This is equivalent to saying that Nicaragua's interpretation of her contractual obligations with Costa Rica, derived from the Cañas-Jerez Treaty, is the same as that declared by the Cleveland Award and by the present decision of the Central American Court of Justice. At that time that Republic believed, with entire justice, that her territorial ownership was charged with an obligation in favor of Costa Rica, limiting, in the judgment of this Court, her contractual power respecting inter-oceanic canal projects; and there is no sufficient reason to believe that that obligation has ceased, for, at the present time, the Cañas-Jerez Treaty, far from having expired, stands ratified in its full vigor by the arbitral award of President Cleveland, to which decision the high parties concede the legal value of a perfect and obligatory treaty.

Whereas:

Due account should be taken of the allegations of the Nicaraguan Foreign Office, that its Government, in concluding the Bryan-Chamorro Treaty, acted within its sovereign powers in contracting with relation to its exclusive territorial circumscription. The particular and general terms of that contract, however, go to establish the contrary.

From the face of Article 1 the conviction arises that the alienation affects lands and waters of the San Juan River, fluvial territory over which both countries are impressed with rights and obligations, and that neither is capable of contracting effectively with respect thereto independently of the other, and, even without a violation of the natural rights of Costa Rica, the contract would still lack the indispensable requisite of counting upon the consultative voice of that Republic, respecting "the disadvantages that may result to the two countries" from the convention.

From the tenor of the dispositions so many times invoked in this action, not a single case of concession for canal purposes could be considered that should not be submitted—to the cognizance of Costa Rica always—and to her decision when her rights are injured or affected.

The argument that it would be necessary to perfect the canal contract by means of a subsequent convention between the United States and Nicaragua, in order thereby to fulfill the unescapable requisite of consulting Costa Rica and to obtain, in that case, her consent, also fails to serve as a pretext in giving a just concordant interpretation to the Bryan-Chamorro Treaty in connection with the Cañas-Jerez Treaty of 1858. It has already been said that in the former is conveyed a perfect alienation, a transfer, in consideration of a fixed price, of the rights of ownership necessary and convenient for the canal route, of which route the Republic of the United States of North America is made owner in perpetuity and without limitation.

Neither the Cañas-Jerez Treaty nor the decision of its authorized interpreter favors that thesis. Those diplomatic instruments impose the obligation to consult Costa Rica as an act preliminary to all canal contracts, and they even prescribe the term within which that consultation shall take place in cases wherein an urgent decision may be necessary. Otherwise Costa Rica's right to be heard and to

give her decisive opinion would be wholly lacking in efficacy. This should be exercised on an occasion propitious for obtaining some practical result, not only in order to guarantee her territorial and contractual rights, but to lend to the common interest of both peoples the concurrence of her opinion and counsel.

To wait until the projected work shall have been located, until the "natural rights" of Costa Rica shall have suffered concrete and material injury, in order then to be able to determine whether the voice of the high party complainant must be consulted, is equivalent to ignoring that there are any acts, of nations or individuals, which, short of material realization, possess inherent powers to injure. The civil law provides a remedy against those acts that carry with them a menace to the rights of a private owner, and the same principle governs in interstate relations, which abound with cases wherein a state demands redress, in the name of its fundamental rights of existence and preservation, for an act that involves a simple menace or danger to the development of those rights.

Whereas:

The high party complainant is justified in impugning the Bryan-Chamorro Treaty as violative of its rights, compromised in an alienation made without its concurrence or consent, in order to convey material and moral interests that did not belong exclusively to the grantor, but were derived from a solemn contract that marked out the line of conduct that must be followed in the future in canal projects. And it is of no avail to allege that the American Senate, in ratifying the said treaty, enacted an additional amendment that contained the provision:

Provided, That whereas Costa Rica, Salvador, and Honduras have protested against the ratification of said convention in the fear or belief that said convention might in some respect impair existing rights of said states, therefore it is declared by the Senate that in advising and consenting to the ratification of the said convention as amended, such advice and consent are given with the understanding, to be expressed as a part of the instrument of ratification, that nothing in said convention is intended to affect any existing right of any of the said named states.

The intention here indicated is most noble and of high importance, since it establishes an obligation upon the United States; but it is without efficacy in so far as it deals with the legal relations between

the nations in litigation, for the injury to the rights of Costa Rica had been consummated and the amendment did not produce the effect of restoring things to the legal status created by the Cafiás-Jerez treaty.

Besides, it appears from the Official Gazette of the Nicaraguan Government of August 24th of the present year, that the Nicaraguan Congress, in giving its approval to the Bryan-Chamorro Treaty, excluded the amendment of the American Senate, thus destroying the concert of action of the two Governments on a point of first importance and leaving to the Senate amendment only such moral force as it may have.

Whereas:

Article IX of the General Treaty of Peace and Amity subscribed at Washington stipulates as follows:

The merchant ships of the signatory countries shall be considered upon the sea, along the coasts, and in the ports of said countries as national vessels, they shall enjoy the same exceptions, immunities, and concessions as the latter, and shall not pay other dues nor be subject to further taxes than those imposed upon and paid by the vessels of the country.

The Bryan-Chamorro Treaty, in granting to the United States a lease of a naval base in the Gulf of Fonseca and of the islands known as Great Corn Island and Little Corn Island in the Caribbean Sea, did not reserve to the high party complainant the rights that are above set forth, and which, reciprocally, were granted by Nicaragua and Costa Rica, for a term of ten years, with an option of extension for a further term. That omission makes those rights uncertain, since those leased territories and the naval base that may be established will be exclusively subject to the laws and sovereign authority of the United States, a nation with which Costa Rica does not maintain the same legal relations, in the matter of navigation, as she does with Nicaragua.

Whereas, finally:

The moment has arrived in which to enter upon an examination of the prayers in the complaint, which are comprised in points second and third, and in which it is prayed that the Bryan-Chamorro pact be declared null and void, not only for the violation of Costa Rica's rights embodied in that treaty, but also on the ground that "when

it was signed both contracting parties well knew of Nicaragua's lack of legal capacity to sign unrestrictedly." The Court, in considering this point in the complaint, declared, upon the unanimous consensus of opinion of its members, that it could not render a decision thereon because of the fact that the Republic of the United States of North America was not subject to the jurisdiction of the Central American Court of Justice, a tribunal called upon exclusively to pass upon the laws enforceable among the Central American states in cases brought before it for the settlement of their conflicting interests and their controversies.

To judge of the validity or invalidity of the acts of a contracting party not subject to the jurisdiction of the Court; to make findings respecting its conduct and render a decision which would completely and definitely embrace it — a party that had no share in the litigation, or legal occasion to be heard — is not the mission of the Court, which, conscious of its high duty, desires to confine itself within the scope of its particular powers.

This doctrinary opinion is strengthened by the valuable opinion of the high party complainant as given forth by one of its counsel, the Licentiate don José Astúa Aguilar, who, in formulating his final argument at the public hearing on the 11th of the present month, presented a resumé and concrete statement of the concluding part of the complaint for the purposes of the final decision, as follows:

That the unquestionable rights of Costa Rica, established by the *Cañas-Jerez* Treaty, the *Cleveland Award*, and the *General Treaty of Peace and Amity of Washington*, have been violated by the high party defendant in the *Bryan-Chamorro* Treaty, and that, according to the texts of the said conventions and arbitral award, that party was legally incapacitated from concluding that pact without the intervention and consent of my Government.

The Court considered, discussed, and decided that all and each of those violations of right had occurred. As a faithful interpreter of the contractual obligations that bind the countries in dispute, and inspired by the universal doctrine that controls the harmonious existence of states, it declared that the Government of the Republic of Nicaragua committed upon the Government of Costa Rica the violations of legal rights claimed by the latter. Its decision could not be more fully stated, because such decision could have no binding force against a state foreign to the institutional system created by the *Treaties of Washington*.

Therefore:

This Court of Justice, in the name of the Republics of Central America, in the exercise of the jurisdiction that has been conferred upon it by the Convention of Washington of 1907, to which it owes its existence, and in conformity with the provisions of Articles I, XIII, XXI, XXII, XXIV and XXV of the said convention, and 6, 38, 43, 56, 76 and 81 of the Rules of Court, and also in accordance with the conclusions voted at the session of the 22d of the present month, and by a majority of four votes against the vote of Mr. Justice Gutiérrez Navas, who was not present, hereby renders the following

DECISION:

First. — It is declared that the peremptory exception interposed by the high party defendant is denied, and that, in consequence, this Court is competent to decide the complaint brought by the Government of the Republic of Costa Rica against the Government of the Republic of Nicaragua.

Second. — It is declared that the Government of Nicaragua has violated, to the injury of Costa Rica, the rights granted to the latter by the Cañas-Jerez Treaty of Limits of April fifteen, eighteen hundred and fifty-eight, by the Cleveland Award of March twenty-second, eighteen hundred and eighty-eight, and by the Central American Treaty of Peace and Amity of December twentieth, nineteen hundred and seven; and

Third. — That, respecting the prayer in the complaint asking that the Bryan-Chamorro Treaty be declared null and void, this Court can make no declaration whatsoever.

Let this decision be notified to the high parties in interest and to the other Central American Governments.

ANGEL M. BOCANEGRA,
DANIEL GUTIÉRREZ,
M. CASTRO R,
NICOLÁS OREAMUNO,
SATURNINO MEDAL,
MANUEL ECHEVERRÍA,

Secretary.

BOOK REVIEWS

La Grande Guerre Européenne et la Neutralité du Chili. By Alejandro Alvarez, former Counsellor to the Ministry for Foreign affairs of Chili, etc. Paris: A Pedone. 1915. pp. 315.

As is indicated by the title, the second part of the present volume, whose author has long occupied an eminent position among specialists in international relations, is devoted to an exposition of the questions of neutrality in the discussion of which his own country, Chile, had during the first year of the pending conflict been particularly concerned. In the first part, questions of neutrality also form an important element, but the survey takes a much wider range, and embraces a consideration of the fundamental causes of the war, a comparison of the European and American political systems, and a series of suggestions as to how armed conflicts are to be avoided in the future. In contrasting the European and American systems, the learned author, continuing to employ the nomenclature with which his name is somewhat distinctively associated, speaks of a "European International Law" and an "American International Law." In these phrases the term "international law" evidently is used in a special and limited sense, since, in its ordinary and general sense, "international law" is neither European nor American. What is really meant is that there is an international system in Europe different from that which exists in America, and that each system has certain rules of its own which are not appropriate and therefore are not common to the other.

The extent to which it may be desirable or may be possible to reform the world after the present great European conflict is over, is a question concerning which opinions naturally vary. In some cases this variance seems to be at least partly due to different attitudes as to the effect of violations of international law. On the one hand, it is assumed that the obligatory character of international law is not destroyed by the actual disregard of its rules by belligerents, while on the other hand there seems to be a tendency to act upon the sup-

position that when rules are violated they cease to exist, so that, after the war is ended, it will be necessary to make international law over again. The latter view has no doubt obtained a certain currency because of the general assumption that the rules of international law have been more extensively violated or disregarded by belligerents in the present conflict than in the previous great European wars. This assumption may readily be shown to be largely or wholly unfounded. No doubt new conditions may call for the application of new rules, but even in this respect, as Lord Stowell once judicially and judiciously observed, the change may consist in the adaptation of an old principle rather than in the invention of a new one. It has therefore generally been found that after great conflicts what was required was the reestablishment rather than the creation of law. For the performance of this task of the future the learned author offers numerous suggestions which can scarcely be examined within the limits of a book review. One line of development which he proposes is that neutrals shall be permitted by means of commissions acting in the various belligerent countries to take a more direct and more active part than they have heretofore done in observing military operations in countries at war and acting upon alleged violations of the laws of war.

The work as a whole merits careful consideration, both by reason of its intrinsic interest and of the author's position as a publicist.

JOHN BASSETT MOORE.

La Penetrazione Straniera nell'Estremo Oriente. By E. CATTELANI. Florence: Barbèra. 1915. pp. 493.

The exceptional character of international law as applied to foreigners in China had for a long time suggested the necessity of a clear, compendious and complete statement of the origin and extension of their privileges; of the nature of consular jurisdiction in controversies between foreigners, between foreigners and natives and in criminal cases; of the immunities guaranteed by treaties to the citizens of other countries residing in China; of the differences between the *Capitulations* of the Near East, and the *Extraterritoriality* of the Far East, which has given rise, so to speak, to divers small states within the state itself.

Professor Enrico Cattelani, of the Royal University of Padua, has accomplished this work in his scholarly book under review.

The author, tracing the historical origin of the *Concessions*, reviews the spontaneous formation of the groups of foreign populations on the Chinese territory. Thoroughly acquainted with the treaties concluded between China and the Western Powers, he gives us much information both interesting and useful about the areas set apart for the residence and use of foreigners; about the character of the said *concessions* and the titles of possession thereto. He brings out the injury inflicted upon the territorial sovereignty and native property by the erroneous interpretation and construction of some of the treaties; he explains the necessities which compelled these same *concessions* to provide for their own administration; he reviews them and analyzes their government, their municipal autonomy and their tutelary authorities.

The author presents in a few pages a complete synthesis of the Chinese sovereignty over the said *concessions*, of the authorities which govern them, of their similar history, of the form and development of the territorial concessions and the transfers of the same to other states.

The doctrines expounded in this work, the important researches of its author, the interesting documents with which he has enriched it, which comprise a long period of time, entitles it to be considered as a guide, a *vade mecum* of great value for the officer in the Far East, and as a precious summary for the student who wishes to have a definite idea of the exceptional law applying to foreigners in these distant regions of the world.

P. HERRERA DE HUERTA.¹

The Rules of Private International Law Determining Capacity to Contract. By F. T. Cheng, LL.D. (London). London: Stevens & Sons. 1916. pp. xvi, 134.

This little volume contains a scholarly exposition of a difficult subject, difficult at least when treated, as here, from the standpoint of the English decisions, though simple enough under the principles adopted by the American courts.

Thus, while the latter courts have adopted the uniform rule that the proper law to govern the capacity of a party to contract is the

¹ Review translated from Spanish into English by Mr. Pedro Capo-Rodriguez, of Washington, D.C.

law of the place where the contract is made, or the *lex loci celebrationis*, save when the title to land is involved, our author, dealing with the English decisions applicable to the subject, has been constrained to divide contracts into three classes, in order to determine definitely the English rules controlling such capacity.

These classes are (1) contracts other than business contracts or contracts relating to immovables; (2) business contracts; and (3) contracts relating to immovables. As concerns capacity, his conclusion is that the English courts will look to the *lex domicilii* to control the first class, to the *lex loci contractus* (law of the place where the contract is made) to govern the second, and to the *lex loci rei sitae* to regulate the third.

Upon reading his discussion of this classification of contracts, one is tempted to surmise that the author has perhaps mistaken confusion of the judicial mind as to the proper law for a conscious distribution of contracts into the classes mentioned. To the mind of the American reviewer it seems probable that upon the final settlement of the principles controlling this question the English courts will be found aligned with their American cousins in discarding altogether the *lex domicilii* as the proper law in such cases.

The capacity to marry is treated by our author under a separate head on the ground that marriage is not a contract but a status, — a conclusion which, as it relates to the capacity to marry, would seem to be justified only upon the theory that a conveyance of land or other executed contract is not a contract. True, the solemn agreement whereby the consorts take one another as man and wife ushers in and creates a status of marriage, but so also a conveyance of land creates a status of ownership. The phrase "capacity to marry" would seem to apply to the capacity to contract marriage, not the capacity to live the married life. And this view, rather than the author's own, appears to be borne out by the result of his investigation of the English decisions.

Beginning with *Scrimshire v. Scrimshire* [1752] 2 Hagg. Cons. 395, he shows that the early English doctrine was that the capacity to marry is governed by the law of the place when the contract of marriage is entered into, and not by the law of the place where the parties live; and that while, in *Sottomayor v. DeBarros* [1877] 3 P. D. (C. A.) 1, the court seems to have receded from that position and to have decided in favor of the law of the domicil, yet in the later case

of *Ogden v. Ogden* [1908] P. (C. A.) 46, it has definitely returned to the earlier position.

The book shows signs of a wide investigation of the authorities not in England only but on the Continent as well, and amply repays the reader's study.

RALEIGH C. MINOR.

Elements of International Law. By George B. Davis. 4th ed. Revised by Gordon E. Sherman. New York: Harper and Brothers. 1916. pp. xxiv, 668.

The last edition of General Davis' well known *Elements of International Law* was published in 1908. A thorough revision of the book in the light of international events which have taken place since 1908 was amply justified. The publishers are, however, to be criticised in taking advantage of the present interest in international law by a new edition of a text book which would naturally be supposed to give the latest developments of international law but which actually makes no addition either to the facts or to the interpretation of international law rules as expounded in the earlier edition of the book. The extent to which the electro-plates of the third edition were used made impossible anything approximating a revision. As a matter of fact 445 of the old plate pages of the text out of a possible 482 have been preserved. The book is advertised as a *revised* edition, and the preface states that it is the purpose of the reviser to "supplement the original text and notes sufficiently to place the work abreast of the numerous additions to the literature of the subject brought forth by the events of the past eight years." The retention and use of the old plates made it difficult to attain the purpose set forth by the reviser, and so we have a book which, except for the addition of a few important documents in the appendix, is practically the same as the edition of 1908. In no sense can it be said to "stand abreast" of other works upon international law. In fact, as an up-to-date text book upon international law, it is far inferior to the texts of Lawrence, Wilson or Hershey, all of which have been either written or rewritten since the London Naval Conference of 1908-09 and which have incorporated the principles agreed upon in that conference. An illustration of the utter

failure of revision of Davis' *International Law* is the chapter upon contraband, a subject of most vital concern today. Not a word has been changed or added to the chapter on that subject in the earlier edition, notwithstanding the Declaration of London and the practice of the belligerents in the present war.

The chief work of the reviser has been the incorporation of certain illustrative historical material at the end of some of the chapters. Such material has been included only by way of substitution, and in a few cases it would seem that the substitution was less important than the material for which it was substituted. The only chapter that has been rewritten is the introductory one, and this is far from satisfactory, viewed as a text-book introduction to the subject of international law. In treating of the sources of international law, the writer gives the impression that the ancient maritime law is to be regarded as by far the most important source. The treatment of this and of other historical sources is too much in the nature of a condensed abstract with mere enumeration of names and dates, which is far from illuminating to an undergraduate student or to the ordinary reader of international law. The original chapter, in the opinion of the reviewer, was better planned for introducing the reader to the general field of international law.

The attempts of the reviser at condensation of historical material within the brief space allowed at the end of chapters has not always proved successful. For example, the endeavor at the end of Chapter IX to give the results of the Hague Arbitral Court in less than one page is disappointing. The inclusion of authorities upon the Hague Convention and the Arbitration Court reduced the space for cases to fifteen lines. The citation of authorities here and elsewhere given in the body of the text might better be included in foot notes or in the general list of bibliography. The addition to the bibliography of the third edition of a list of recent works on international law and the incorporation in the appendix of the Declaration of London 1909 and the document of the Carnegie Endowment for International Peace giving the list of signatures, ratifications, adhesions and reservations of the conventions and declarations of the First and Second Hague Conferences constitute the most valuable additions in the new edition. Other new material included in the appendix are: the extradition treaty of 1910 between the United States and the Dominican Republic and a brief treatment of the topics: transfer to neutral flag, merchant

vessels armed for defence, air craft and wireless telegraphy in time of war and radiotelegraphy treaty.

Had the reviser incorporated such changes in the text as would have been warranted by the documents in the appendix, the fourth edition of Davis' Elements of International Law might have taken its place with other modern text books on international law; but, for the reasons above mentioned, it fails of being a suitable text book in the year 1917.

FRANK A. UPDYKE.

Recueil de rapports sur les différents points du programme — minimum de l'Organisation centrale pour une paix durable. The Hague: Martinus Nijhoff. 1916. 2 vols. 370 + 355 pages.

This collection of reports or essays is in the nature of a preliminary discussion of the nine parts of the "Minimum Programme" which the Central Organization for a Durable Peace hopes to see adopted by the family of nations at the end of the present war. The Executive Committee of the Central Organization designed them primarily as aids to the members of its various International Committees of Research, which are travelling over the weighty problems of its Minimum Programme; but it hopes, also, that they may be of service to the many minds in many lands which are grappling, individually or collectively, with these same problems, the difficulty of which is commensurate with their vast and vital importance. If the essays are widely read, this hope would be largely realized; for most of them are filled with instructive and stimulating suggestions, and are written by well-known publicists.

That the volumes partake of a largely international character is apparent from the facts of their authorship. Of the thirty-five essays contained in the two volumes, seven are written by Americans, six by Englishmen, five by Austro-Hungarians, four by committees of Hollanders, three by Norwegians, two by Belgians, two by Germans, and one each by a Brazilian, Frenchman, Italian, Swede, Swiss, and a committee of Danes. Seventeen are in English, ten in German, and eight in French.

The subject of annexation and conquest is discussed in one essay; the freedom of the seas in one; the limitation of armaments in two;

the open door in three; democratic control of foreign policy in four; the rights of dependent nationalities in five; and the development of the judicial and legislative work of the Hague Conferences in nineteen. Thus it is seen that while some of the chief causes of the present and other wars are dealt with in sixteen of the essays, more than half of the whole number are devoted to a consideration of other than military means of settling controversies between or among nations.

While there is, naturally, some divergence of opinion expressed in the essays, there is, despite widely variant national viewpoints, a gratifying consensus of opinion on the great question of international organization. Such a book, produced while the greatest of military tempests is raging in so large a part of the world, is like a rainbow of promise for the future success of mankind in rendering even the threat of another such tempest harmless. The public-spirited committee of Netherlanders whose initiative and energy are back of these studies are to be heartily congratulated on these first fruits of their endeavor towards the constructive international statesmanship of which the world is at present so sadly in need. Their efforts are especially appropriate and praiseworthy in the land of Hugo Grotius and the two Hague Conferences.

WM. I. HULL.

Germany and England, 1740-1914. By Bernadotte Everly Schmitt. Princeton University Press. 1916. pp. 524, 2 maps, index, and appendix.

The title of this work is misleading, for it fails to make clear either what the content or the purpose of the volume is. The author, who is Assistant Professor of History in Western Reserve University, has, however, produced a book much more interesting and valuable than the reader would infer from this heading. In the short space of fifteen chapters the writer has given us a complete and fascinating story of the chief European diplomatic activities during the quarter of a century preceding the war, which either had a bearing on, or led up to, this great conflict. In spite of the proximity of the year 1916 to the period under discussion, and of the atmosphere of partisanship which hovers over all parts of the earth at this time, he has handled the subject in an eminently historical and unbiassed fashion.

Dr. Schmitt describes the numerous intricate and delicate international questions over which all the disputes of the past twenty years have arisen, with justice and fairness to all parties. He points out clearly the main features of each problem and the different point of view taken by each participant in the discussion. And he explains the foreign policies of Germany and Great Britain, the aims and methods pursued by each, together with the measure of success or failure attained by each of these states in recent years. Among the voluminous literature on the war, which has appeared up to date, no other single volume is better adapted to giving the general reader and the student a clearer view of the conditions leading up to the great conflict than this book of Dr. Schmitt. It ought to become a standard work on the period with which it deals.

We are pleased to note the lucid and interesting style, which will commend the book to many people. It is a satisfaction to see an increasing number of the younger historians produce volumes which are as readable and attractive in form as they are learned and accurate in contents. For it is no longer true that histories to be valuable must be "dry-as-dust," or a mere procession of accurately related incidents told in chronological order.

Dr. Schmitt's book would have been stronger, if his grouping of chapters had been arranged so as to give a continuous story of the same topics of discussion. For instance, he separates the account of the European competition in the Near East, giving most of it in Chapter 10 on "The East East" and the rest in Chapter 12 on "The Eve of the War." And the story of the Moroccan conflict is divided between Chapter 9 on "The Triple Entente" and Chapter 11 on "Agadir and Its Aftermath." Then his account of certain diplomatic "incidents" loses force because of the omission of important final details, or a tendency to slur over some vital facts. For instance, his story of the "Near Eastern Questions" would have been materially improved if he had given in detail the "initialed" agreements between England, Germany, France, and Russia concerning the commercial partition of Turkey, which had been satisfactorily concluded by June, 1914, assuring Germany of the lion's share of the economic development of the Ottoman Empire. Again, in writing of the diplomatic *rapprochement* between France and England in 1904, he fails to give due weight to the series of earlier agreements between these states concerning their African possessions, conducted between 1882 and 1899. And,

in discussing the "German Empire," he gives more space to Emperor William II, and less to the lack of political acumen and foresight among the German people, than the best authorities probably would give.

It is unfortunate that the publishers did not put better maps in the volume; and possibly Dr. Schmitt could have materially improved his book, if he had delayed its publication for a year or so longer, until he could have had access to some documents not accessible when he was writing. However, we congratulate him on his excellent volume, which so effectively disposes of the various "myths" and "claims" concerning the causes of the war. It is recommended as a valuable work, useful alike to the student, the general reader, and the expert in international affairs.

N. DWIGHT HARRIS.

The Life of John A. Rawlins (Grant's Chief of Staff). By James Harrison Wilson. New York. The Neale Publishing Company.

The subject of this biography is described in the title page as "Lawyer, Assistant Adjutant General, Chief of Staff, Major General of Volunteers, and Secretary of War." The author is well fitted for his work, which was undertaken at the dying request of his subject. He was associated with him in General Grant's Staff in the Vicksburg and Chattanooga Campaigns, and served in the same army in Grant's advance on Richmond, which gave him special opportunities of knowing and recording the services of the Chief of Staff.

The author is one of the few remaining general officers of the Union Army who gained distinction for gallant service in that memorable contest. In some respects his career has been unique in our military history. A graduate of West Point on the eve of the Civil War, he entered the Union Army a youth in years but of high standing as an engineer officer, and rapidly passed through all the grades of promotion from a lieutenant to major general, first in the volunteer and afterwards in the regular army, at the close of that war a corps commander. Having retired from the service, he reentered it in the Spanish War, in which he served as a corps commander and as department commander of two important provinces of Cuba. Again, when the Boxer outbreak threatened the lives of our diplomatic officials and citizens in China, he was recalled to the service and

placed second in command in the United States forces in the relief expedition to Peking. Such an experience is unparalleled in our military history.

But our author has another qualification for the work we have in review. After his retirement from the army, although immersed in important business interests, he devoted much of his time to the study of the records of the Civil War, and few if any of the high officers of our army have contributed such voluminous material to the history of that great conflict. His own military service has been written in the form of an autobiography with the title of *Under the Old Flag*. In another work, *The Life of General William F. Smith*, he has given an interesting sketch of one of our distinguished major generals of that period. In his *Life of Charles A. Dana*, Assistant Secretary of War and afterwards Editor of the *New York Sun*, he gives a vivid picture behind the scene of Grant's campaigns and of political affairs following the war. With such a record of literary labors, he was well prepared to give the country in permanent form the narrative of the great Chief of Staff.

Rawlins came of humble but sterling parentage of Scotch-Irish stock. The son of a farmer, he owed his education in one of the best schools of his region to his own unaided efforts. He had been engaged in the practice of his profession, the law, seven years when the Civil War broke out, in which time he had already gained a good standing, filled some important offices and was a prominent member of his political party. He had only recently concluded a hot campaign as an elector on the Democratic State ticket in advocacy of the election of Stephen A. Douglas as President. Then came the election and inauguration of Lincoln and the firing upon Fort Sumter.

In one of the most thrilling portions of his *Life of Rawlins*, General Wilson has described the public meeting which was called at Galena, Illinois, the home of Rawlins, to express the indignation of the people at "the firing on the flag." Rawlins was advised by many of his Democratic associates not to attend the meeting, but his answer was "I shall go to the meeting, and if called upon, I shall speak. I know no party now. I only know that traitors have fired upon our country's flag." The meeting was first addressed by one of its citizens, Elihu B. Washburne, Congressman-elect, afterwards so prominent in public affairs. The audience then called for Rawlins, who promptly came to the stand and delivered a strong Union speech,

concluding with the words: "I have been a Democrat all my life; but this is no longer a question of politics. It is simply union or disunion, country or no country. I have favored every honorable compromise, but the day for compromise is past. Only one course is left for us. We will stand by the flag of our country and appeal to the God of Battles." (Page 48.)

One of the persons who attended this meeting and listened to Rawlins' stirring appeal to arms was Ulysses S. Grant, then a private citizen and resident of Galena. General Wilson narrates that Grant told him when this speech was fresh in his memory, that he had listened to it with rapt attention, that it had stirred his patriotism, and rekindled his military ardor. It also removed all doubt from his mind as to the course he should pursue, and from that day forward he supported the doctrine of coercion which Rawlins had so eloquently proclaimed. The influence which the speech had made upon Grant's mind was evident from the fact that soon after, when President Lincoln appointed him a Brigadier General, he wrote at once to Rawlins and offered him a place on his staff.

The biographer's account of the political condition at the time of the breaking out of hostilities adds much to the credit of Rawlins in taking such an unequivocal position in support of the war, and brings out a phase of public affairs at the time greatly to the credit of a large political body in the North which proved decisive for the Union. Reference has been made to the fact that Rawlins was a Democrat, and as such had participated in an active campaign in support of Douglas and his views on the Slavery question. Too much praise cannot be bestowed upon the great body of the Democratic party in the Northern States that, immediately following a heated political contest, like Rawlins, gave its prompt and hearty support to its party adversary, Lincoln, in prosecution of the war for the Union. Without this support the nation could hardly have been saved. The fact that a small band in Illinois and the adjoining State of Indiana, entitled "Copperheads," sought to manifest sympathy for the South, only intensified the devotion of the War Democrats.

Rawlins is a type of the large body of officers who served through the war and brought it to a successful conclusion. True, the three great generals, Grant, Sherman and Sheridan, and a number of others, were graduates of West Point, but the major part of the fighting was done under the command of officers who came into the service

without any preparation for their work. This does not argue against due preparedness, but it shows that in times of great peril the country possesses the elements which will save it from the most threatening disaster. His biographer says of Rawlins that he was without knowledge of military administration or military organization, and knew absolutely nothing of the duties of either the staff or the line when he entered the army. He was merely a plain citizen of average education and a lawyer by profession, all of whose thoughts, aspirations and pursuits were those of peace up to the outbreak of the war between the States. He was not even in sympathy with the party whose candidate had been elected to the Presidency, and yet it may be doubted if it was the lot of any man, who did not actually reach the command of an army or become a member of the Cabinet, to render the country greater or more valuable services than did Rawlins in the four years' war for the Union.

General Grant himself repeatedly acknowledged him to be his most useful support. A most careful and competent observer, attached to Grant's headquarters throughout the war, referring to a critical stage in the battle of Chattanooga, has made this record:

It is due to General Rawlins, Chief of Staff, to state that upon this occasion as upon that of all Grant's great campaigns, he is entitled to one-half the praise, for the strategy. Tactical successes were due to others, but no general or broad plan of campaign, or pitched battle was ever adopted by General Grant without the unqualified assent and approval of Rawlins. The latter was his only military confidant and often originated many of the most successful operations. (Page 173.)

Rawlins having entered the service as his constant and confidential companion from General Grant's first battle at Belmont in 1861 to Lee's surrender at Appomattox in 1865, his life for that period was necessarily a narrative of or reference to all the campaigns of the General-in-Chief. His biographer was, therefore, in execution of his task, undoubtedly constantly under the temptation to write a history of the war, which would have made the work too voluminous for the average reader. Although somewhat bulky in appearance, the author has brought the volume within the compass of four hundred pages, and departs as little from the biographical character as the subject would permit.

While the biographer, as we have seen, gives Rawlins credit as Grant's right hand in his military work, he claims him to have been

much of a civilian and statesman. He was a strong supporter of the Monroe Doctrine, and, immediately after the collapse of the Confederacy, advocated the forcible expulsion of the French and Maximilian from Mexico. It was entirely in consonance with his advice that Grant sent the large force under Sheridan to the Texas frontier, which but for the diplomatic action of Secretary Seward in securing the peaceful withdrawal of the French, would doubtless have marched into Mexico in support of the republican leader Juarez.

The Chief-of-Staff is likewise credited with having brought Grant over to the project of settling by force of arms our controversy with Great Britain over the Alabama claims and that country's unfriendly conduct during the war. The author claims that Grant was strongly in favor of that policy, and that with the most powerful navy in the world and an army of 500,000 veteran soldiers, "there can be little doubt as to what would have been the result." (Page 328.)

Again, he asserts that Rawlins also advocated armed intervention in favor of the insurrectionists in Cuba. Happily, however, for the peace of the country, these two questions were deferred to the time when Grant became President, the war spirit had cooled down, and the responsibility of office led him to accept the more conservative policy of Secretary Fish.

It appears that after the death of Lincoln, when Andrew Johnson succeeded to the Presidency, Rawlins encouraged General Grant in support of his administration, but as "the policy" of the President developed and his controversy with Congress grew more intense, they both began to doubt its wisdom, and after "swinging around the circle" with him, their sympathy for him ceased. Rawlins took an active part in bringing about Grant's first nomination for the Presidency, and his appointment as Secretary of War was the last and crowning act of his confidence and friendship. Unfortunately, Rawlins had little opportunity to serve his country in his new post as within a few months after his appointment he was brought to his grave by the insidious disease against which he had been so long contending.

The author has made public for the first time in authentic form a service rendered to his chief by Rawlins which was equal in importance with his military service—a narrative of a most delicate character which the author has treated with becoming discretion. Following the battle of Shiloh in the first year of the war, in which his army barely escaped defeat, rumors attributed the situation to

General Grant's intemperate habits, and the matter was freely discussed in the press of the country at the time. It appears that there was some foundation for the rumors, and Rawlins was greatly disturbed by the situation. He was heart and soul devoted to the success and welfare of his chief, and labored in every way possible to correct the evil habit, to the extent of securing from him a written pledge of total abstinence. But surrounded as the General was by persons who presented constant temptation, Rawlins saw that he was not adhering to his pledge, and during the siege of Vicksburg he wrote him a long letter remonstrating in plain language against his conduct, and concluding by informing him that unless he should correct it he, Rawlins, would have to ask to be relieved from service with him. The letter, which is reproduced in the book under review, page 128, is a striking proof of his faithfulness as a friend and a true patriot. It appears that it was not resented, but heeded for a season at least; nevertheless, Rawlins was constantly on the alert lest the recurrence of the habit might imperil the country and ruin the General's reputation.

The book has many references to the domestic life of Rawlins, which add a real charm to the reading. Following the account of the capture of Vicksburg, a romantic story is told of his courtship of his wife, a charming and accomplished young woman from New England, a governess in the family of the planter at whose house General Grant established his headquarters. Many of Rawlins' letters to his wife are given, which not only throw much light on military operations, but develop his family relations. He was accustomed to write her a letter daily unless prevented by the exigencies of his office. In a letter from Chattanooga he tells her of General Grant's joking comment on this habit: "He laughs at my writing you daily, and says he don't think I will hold out so constant and frequent a correspondent." (Page 391.) From City Point he writes her:

The General has written Mrs. Grant to come down here week after next and asked me your address for Mrs. Grant, as she intended or had spoken of inviting you to come with her.

Now I would like very much to have you come, were it not that I disapprove of having officers' wives in camp. It does not look like war to me, to see it heralded throughout the country by the press that the wife of the General and also the wife of the Chief-of-Staff are at City Point, and would be what I would avoid unless some good end could be subserved by it, besides the item of expense

and the disposition of the children during your absence is something to be considered. However, I leave the matter to your decision, after having stated my views, and whatever it is will meet with my concurrence and approval. (Page 285.)

But Mrs. Grant had her way, and the wife of the Chief-of-Staff came to headquarters near the battle front for a brief visit.

Throughout the biography there runs a vein of true appreciation of Rawlins' character and services, but this is especially the case in the concluding chapter, in which, in touching language, the author terminates his labors, in compliance with the dying request of his intimate friend and companion in arms. It is a work well done and will receive the plaudits of the few remaining soldiers who participated with him in those memorable campaigns which gave peace to a reunited country and saved the nation for its great mission in the world. The reviewer, however, cannot withhold a regret that the book had not appeared at an earlier date, so that many thousands more of his comrades might have enjoyed this worthy record of one of the greatest patriots of the Civil War.

JOHN W. FOSTER.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations see Chronicle of International Events, p. 165]

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KATHRYN SELLERS.

BRITISH PRIZE COURT DECISION IN THE CHICAGO PACKING HOUSE CASES

In November, 1914, four vessels of Norwegian register, the *Kim*, the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland*, bound from New York to Copenhagen, were captured on their voyage by British warships and their cargoes were seized on the ground that the foodstuffs, which constituted the bulk of the shipments, were conditional contraband suspected of being destined for the government or armed forces of Germany.

In September, 1915, the British Prize Court rendered its decision condemning as prize the shipments of foodstuffs which belonged to the Chicago Packers. An appeal was taken by the Packers to the Privy Council, but while this appeal was pending, negotiations for a settlement were entered into by the British Government with the Packers, and a settlement having been agreed upon, disposing of the questions at issue so far as they were concerned, the appeal was withdrawn.

Of all the decisions of the Prize Court affecting the rights of neutrals, this decision was perhaps the most important and most disturbing to neutrals, for, although it applied in terms only to certain particular shipments, the decision in its conclusions as to the law of contraband and the doctrine of continuous voyage in relation to conditional contraband had a general application to all neutral commerce, and not only was it exceedingly prejudicial to neutral interests, but it invoked the authority of British Orders-in-Council as superior to international law. For these reasons it would have been interesting and useful from the point of view of international law and in the interest of determining exactly what was the law to be applied by the British Prize Court to have had this decision carried to the Privy Council for review on appeal. Inasmuch, however, as that was prevented by the settlement of these particular cases, it may be of interest to examine some of the grounds upon which it was contended in the settlement negotiations that the position taken by the Prize Court in condemning these shipments was

inconsistent with and unsupported by the law of contraband applicable in such cases as previously interpreted and recognized both by the Government of Great Britain and by the Government of the United States, and particularly the ground that neutral rights under the principles and rules of international law, as hitherto established, governing neutral trade, were not subject to limitation by British Orders-in-Council or other municipal legislation.

One of the principal objections urged against this decision was that it disregarded the essential differences between absolute and conditional contraband of war, to which both Great Britain and the United States were committed by precedent and practice, and deprived goods listed as conditional contraband of the protection to which they were entitled under international law.

Since the beginning of the war, and at the time these seizures were made, foodstuffs were listed as conditional contraband in all the contraband proclamations of the British Government, and all of the shipments of foodstuffs which were condemned in these cases stood on the basis of conditional contraband. Even the special food products which the court held might be used for the production of glycerine were entitled to treatment as conditional contraband, because, when these shipments were seized, glycerine was listed as conditional contraband.

To these shipments the Prize Court applied the doctrine of continuous voyage or transportation. This doctrine the court held had become part of the law of nations at the commencement of the present war both in relation to carriage by sea and transportation by land. As applied to the carriage of absolute contraband, the correctness of this statement of the law was not questioned, but it cannot be admitted that this doctrine has heretofore been applied to the carriage of conditional contraband, except in special circumstances, with well-defined limitations, or that such an application of this doctrine has been adopted by the consensus of nations. If it had been so adopted, it would not have been rejected in the Declaration of London.

In its application to absolute contraband when consigned to a neutral country, this doctrine imposes upon the captor the burden of proving an intention on the part of the shipper that the goods shall proceed by a continuous voyage or transportation to an enemy country

as part of a single commercial transaction, complete from its inception, without interruption by sale into the common stock in trade of the neutral country before going forward to the enemy territory.

Any extension of this doctrine to conditional contraband, therefore, must necessarily impose upon the captor the same burden of proof as in the case of absolute contraband. Moreover, conditional contraband is not liable to condemnation as contraband unless the captor proves not only that the goods were on their way to enemy territory under the conditions above defined, but also that, as part of the same transaction, they were necessarily predestined to the enemy government, or its military forces as the real consignees.

The Prize Court seems to have disregarded these requirements.

In all of these cases the ship's papers showed a neutral destination, and no positive proof to the contrary was furnished on the part of the Crown. Furthermore, in each of these cases an affidavit was furnished by the shipping companies, sworn to by a responsible officer of the company, to the effect that:

The whole of the said goods were shipped to the order of the said Agent in Copenhagen for sale in the Agent's own district as aforesaid, in the ordinary course of business. The standing instructions to the Agent that no sales were to be made outside the Agent's district were never withdrawn by the Claimants and the Agent had no authority to sell the goods except to firms established in Denmark, other Scandinavian countries, Finland, or Russia.

and

None of the said goods had in fact been sold prior to the seizure of the Steamship and they were at the date of such seizure the property of the Claimants.

The court clearly understood the meaning and effect of these affidavits, as appears from the following comment upon them in the decision:

Germany is not named; and the impression conveyed, and clearly intended to be conveyed, was that the goods were shipped and consigned for purely Scandinavian business, as if the war had not intervened.

Nevertheless, the court adopted the contention of the Crown that the shippers intended these goods to go through to Germany by con-

tinuous voyage, without interruption by sale in neutral territory, although the case of the Crown rested wholly on presumptions or inferences drawn from circumstances which when impartially considered are at most no more significant of an enemy destination than of a neutral destination. Apparently the only reason for the adoption by the Prize Court of the presumption of an enemy destination was because the claimants did not undertake to disprove mere possibilities of a destination which had not been proved as a fact by the Crown.

In order to establish a presumption that shipments consigned to a neutral country were actually intended by the shippers to proceed to enemy territory, the Prize Court laid great stress upon the existence of a surplus supply of foodstuffs in the neutral country to which these shipments were consigned. The existence of a surplus supply of foodstuffs, obviously, is wholly inconclusive as proof that these particular shipments were intended to proceed by continuous transportation through the neutral country as part of the original transaction initiated by the shippers, and the objections of the Government of the United States to the presumption of enemy destination based upon evidence of greatly increased imports into neutral countries adjoining Great Britain's enemies, were made clear in the note addressed on October 21, 1915 by it to the British Government in relation to the restraints imposed by the British Government upon American commerce.

In that note it was stated that such a presumption arising from such circumstances was:

too remote from the facts and offers too great opportunity for abuse by the belligerent, who could, if the rule were adopted, entirely ignore neutral rights on the high seas and prey with impunity upon neutral commerce.

and that

To such a rule of legal presumption this Government cannot accede, as it is opposed to those fundamental principles of justice which are the foundation of the jurisprudence of the United States and Great Britain.

There is no reason in law why the residents of a neutral country adjacent to an enemy of Great Britain should not export its own food products to Germany, or food products imported from another neutral

country for that purpose, and American food products shipped to the neutral country to supply a demand thus created cannot lawfully be treated as contraband.

That note further called attention to the fact that His Majesty's Government have admitted that British exports to neutral countries adjacent to Germany also have increased materially since the present war began, and pointed out that:

Thus Great Britain concededly shares in creating a condition which is relied upon as a sufficient ground to justify the interception of American goods destined to neutral European ports. If British exports to those ports should be still further increased, it is obvious that, under the rule of evidence contended for by the British Government, the presumption of enemy destination could be applied to a greater number of American cargoes, and American trade would suffer to the extent that British trade benefited by the increase. Great Britain cannot expect the United States to submit to such manifest injustice or to permit the rights of its citizens to be so seriously impaired.

As further stated in that note:

Whatever may be the conjectural conclusions to be drawn from trade statistics, which, when stated by value, are of uncertain evidence as to quantity, the United States maintains the right to sell goods into the general stock of a neutral country, and denounces as illegal and unjustifiable any attempt of a belligerent to interfere with that right on the ground that it suspects that the previous supply of such goods in the neutral country, which the imports renew or replace, has been sold to an enemy. That is a matter with which the neutral vendor has no concern and which can in no way affect his rights of trade.

Another reason for challenging the validity of that presumption was furnished by the court itself, for it decided, as shown below, that the surplus supply of foodstuffs in Denmark did not raise the presumption of destination to Germany in the case of foodstuffs imported into Denmark by residents of Denmark.

In every instance in which foodstuffs seized on these vessels were shown to belong, at the time of their seizure, to residents of the neutral country to which they were consigned, the Prize Court held that they were not liable to condemnation, and ordered their release. A distinction was thus drawn in the case of foodstuffs shipped from the United States to Denmark between those owned by residents of Denmark,

and those owned by residents of the United States and consigned to their selling agents in Denmark. But the situation thus created by a surplus supply of foodstuffs in Denmark had exactly the same bearing upon additional foodstuffs imported by Danish owners as upon those imported by the agents of the American shippers, and if it did not create a presumption that the Danish importers were importing with the intention of selling to the German market, it could not justly be held to create that presumption in the case of the American shippers.

This discrimination against shipments of conditional contraband from the United States to a neutral country, unless such shipments were owned by and made to residents of that country, in effect established an embargo against trade between the United States and neutral countries when carried on by American citizens, even if they had resident agents in those neutral countries, and permitted such trade to be carried on only when in the hands of residents of those neutral countries. It may be that it was not the intention of the court to establish such an unfair discrimination against American interests; but whether intentional or not, the fact that the decision of the court produced that result did not inspire confidence in the conclusions reached by the court.

It is unnecessary, however, for the purposes of the present discussion of this decision to examine into the sufficiency of the evidence upon which the court based its presumption of destination to enemy territory, because, as stated in the American note above mentioned, "even if goods listed as conditional contraband are destined to an enemy country through a neutral country, that fact is not in itself sufficient to justify their seizure."

The conclusion of the court on that branch of the case, therefore, was wholly immaterial, unless, as above pointed out, destination to enemy territory was coupled with proof that the enemy government, or its military forces, were the real consignees, and it is to the treatment by the court of this second and indispensable branch of the case that attention is particularly directed.

The *Kim* was the only one of these four ships which sailed subsequent to the British Order-in-Council of October 29, 1914, and in deciding this branch of the case the court considered separately the

shipments on the *Kim* from the shipments on the other vessels, and dealt with the *Kim* case under the provisions of the Declaration of London as adopted and modified by that Order-in-Council, leaving the other cases to be dealt with under the rules of international law, independently of the Declaration of London or Orders-in-Council.

In the case of the *Kim* the court applied the provisions of paragraphs 3 and 4 of the order, which imposed upon the owner of shipments of conditional contraband to neutral ports the burden of proving that their destination was innocent "if the goods are consigned 'to order' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the enemy."

As in all the other cases, the foodstuffs on the *Kim* which were condemned were consigned to the shippers themselves, or their order, or to named consignees in the neutral country acting as the selling agents of the shippers in that country, or to the order of such consignees, and none of these shipments were consigned, in the words of the Order-in-Council, simply "to order." The consignment of shipments simply "to order" is a well established form of consignment, and unquestionably the language of the Order-in-Council was intended to apply to that particular form. Nevertheless, in applying this Order-in-Council, the court disregarded its express terms, which are emphasized by placing the words "to order" in quotation marks, and construed it as applicable to shipments which were not simply "to order" but to the order of named consignees, and held that this established a presumption of enemy destination which must be disproved by the shipper. The court condemned these shipments as contraband because the shippers declined to undertake this burden, which they contended was not imposed upon them either by international law or, by the terms of the British Order-in-Council on the facts in this case, which facts, moreover, they contended did not justify a presumption of enemy destination.

It is true that in the *Springbok* case (5 Wall. 1), which is cited by the Prize Court in support of this decision, a presumption of destination to a port other than the one named in the ship's papers was drawn in the special circumstances of that case, because the consignment was

"to order or assigns." But the presumed port of destination in that case was a blockaded port, and the condemnation was for an intended breach of blockade. A presumption of destination to a blockaded port may arise from a much simpler state of facts than a presumption of enemy destination, but no question of blockade is involved here, as no blockade had been established when these seizures were made. In the *Springbok* case no presumption of destination to the enemy government or its armed forces was drawn from the consignment "to order," and the court did not hold and the decision does not furnish a precedent for the present contention that conditional contraband is subject to condemnation merely because destined to enemy territory. In the case of conditional contraband, as above pointed out, it is not sufficient merely to show that shipments are destined to enemy territory, and even if these shipments in the present case had been consigned simply "to order," as provided in this Order-in-Council, and even if the rule in the *Springbok* case was applicable, the presumption thereby raised that they were destined to proceed beyond a neutral port to enemy territory would not be sufficient to justify their condemnation as contraband.

In other words, a consignment to order is not presumptive evidence of enemy destination in the case of conditional contraband, and therefore the presumption of enemy destination in such a case, which the British Order-in-Council of October 29th has imposed upon the Prize Court, rests upon a state of facts which is wholly insufficient to support that presumption. The Prize Court held that it was bound to adopt this presumption on account of the rule laid down by this Order-in-Council, and in giving effect to this presumption, explained in the decision that:

As to the modifications regarding presumptions and onus of proof, as, for instance, where goods are consigned "to order" without naming a consignee, these are matters really affecting rules of evidence and methods of proof in this Court, and I fail to see how it is possible to contend that they are violations of any rule of International Law.

This view calls for a most emphatic dissent if the interests of neutrals are not to be abandoned to the arbitrary control of a belligerent. The Order-in-Council attempted to impose upon neutral shippers the burden

of disproving a fact the existence of which had not been established and the burden of proving which rested with the Crown, and this shifting of the burden of proof clearly affected a substantial right of the claimants. The condemnation of these shipments because of this shifting of the burden of proof shows how seriously their substantial rights were thereby affected. Furthermore, the legality of a presumption drawn from a fact which is wholly insufficient to support that presumption, cannot be admitted.

Neither the British Government, nor a British Prize Court, is at liberty to impose upon neutral commerce, which is not voluntarily within their jurisdiction, a regulation restricting a substantial right to which neutrals are entitled under international law.

In this connection it will be recalled that the Government of the United States had previously informed the British Government in a communication addressed to the British Government on July 15, 1915, that in so far as American interests are concerned:

the Government of the United States will insist upon their rights under the principles and rules of international law as hitherto established, governing neutral trade in time of war, without limitation or impairment by Orders in Council or other municipal legislation by the British Government, and will not recognize the validity of prize court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law.

In these circumstances it was clear that the Government of the United States could not fail to regard the enforcement by the British Prize Court of these provisions of the British Order-in-Council of October 29th in conditional contraband cases as a violation of substantial rights of American claimants and as contrary to the recognized principles of international law, and could not recognize as valid the decision of the Prize Court in that respect.

The court itself apparently had some doubt as to the legality of the condemnation of the *Kim* cargo on the above grounds, for, notwithstanding its conclusion that under the Order-in-Council of October 29th, the goods claimed by the shippers on the *Kim* were confiscable as lawful prize, the court proceeded to include the *Kim* cargo with the cargoes of the other three vessels before it, in considering the question

of their confiscability apart from the operation of the Order-in-Council of October 29th.

With regard to these vessels the court held that neither the Order-in-Council of October 29th, nor any previous one, was applicable to them at the time of their seizure, and that the question of the condemnation of their cargoes "must be decided in accordance with the rules of international law." The attitude of the court as to these cargoes was briefly as follows: Starting with the presumption that the cargoes, although ostensibly destined for a neutral port, were in reality destined for Germany, the court proceeded to determine "whether their real ultimate destination was for the use of the German Government or its military or naval forces." In answering this question the court assumed that these foodstuffs were adapted for military use and in part "for immediate warlike purposes in the sense that some of them could be employed for the production of explosives." This referred to the production of glycerine from lard, although glycerine, as above pointed out, was listed at that time as conditional contraband. It also assumed that they were destined "for some of the nearest German ports like Hamburg, Lubeck, and Stettin, where some of the forces were quartered," although the court admitted that "no particular cargo can definitely be said to be going to a particular port," and at most the assumption was based on mere suspicion.

The principal ground, however, on which the court seemed to rest the presumption of destination to the German Government for military use is that, "about 10 millions of men were either serving in the German army, or dependent upon or under the control of the Military Authorities of the German Government, out of a population of between 65 and 70 millions of men, women, and children"; and that "of the food required for the population, it would not be extravagant to estimate that at least one-fourth would be consumed by these 10 million adults."

In support of this inference that a large proportion of these foodstuffs would necessarily be used by the military forces, the court cited the British Foreign Secretary's statement in his note of February 19, 1915, to the American Government that:

The reason for drawing a distinction between foodstuffs intended for the civil population, and those for the armed forces or Enemy Gov-

ernment disappears when the distinction between the Civil population, and the armed forces itself disappears. In any country in which there exists such a tremendous organization for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not.

The position of the Prize Court seemed to be that in view of existing conditions in Germany, foodstuffs had lost their status of conditional contraband, and must be treated on the basis of absolute contraband. Whatever might be said as to the propriety of listing foodstuffs as absolute contraband on account of conditions then existing in Germany, it must be remembered that at the time these seizures were made, foodstuffs were actually listed as conditional contraband in the contraband proclamations of the British Government. Neutral shippers were entitled to rely upon the official representations of the British Government, and in order to affect the rights of neutrals, changes in the contraband lists proclaimed by the British Government should have been made and announced by the British Government before the cargoes sailed and not by a process of judicial legislation after the cargoes were seized and placed in the Prize Court.

The Prize Court seems to have entirely overlooked the distinction between changing conditional to absolute contraband by proclamation by the British Government and by judicial legislation by the court. It cites in support of its conclusion that articles listed as conditional contraband may be treated as absolute contraband, an extract from an editorial note in this JOURNAL, which expressed the opinion that in view of the extensive organization of the non-combatant population of Germany for military purposes "it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband."

The court failed to note that the opinion expressed was that the belligerents and not the Prize Court would be inclined to take this attitude, which really meant that the belligerent governments would be inclined to list as absolute contraband articles usually listed as conditional contraband, and in no sense expressed the view that a prize court could make that change by judicial legislation. Moreover, the statement went no further than to say that "it seems likely that

belligerents will be inclined," and the court itself in the course of the argument noted that the views expressed went no further. As appears from the record of the trial, when this editorial comment was read to the court during the argument, the court said: "That states the very question which has been troubling me a little."

The Solicitor-General responded: "And it takes a decided view of it."

The court replied: "No, I do not think it does. What it says is 'It seems likely that they would be inclined.'"

The subsequent citation of this opinion in support of its decision is suggestive of the extremes to which the court was forced to go in grasping at straws to sustain an unsound position.

The Government of the United States is entitled to insist upon the same treatment of neutral commerce in the present war that it insisted upon in its discussion of the subject with the Russian Government in 1904, during the Russo-Japanese War, and which was clearly set forth in a communication from Secretary of State Hay, as follows:

When war exists between powerful States it is vital to the legitimate maritime commerce of neutral States that there be no relaxation of the rule — no deviation from the criterion for determining what constitutes contraband of war, lawfully subject to belligerent capture, namely, warlike nature, use, and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use, are contraband of war if destined to enemy territory; but articles which, like coal, cotton, and provisions, though of ordinarily innocent are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.

This substantive principle of the law of nations cannot be overridden by technical rule of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature; and it can not be admitted that the absence of proof, in its nature impossible to make, can justify the seizure and condemnation. If it were otherwise, all neutral commerce with the people of a belligerent State would be impossible; the innocent would suffer inevitable condemnation with the guilty.

The established principle of discrimination between contraband and noncontraband goods admits of no relaxation or refinement. It must be either inflexibly adhered to or abandoned by all nations. There is and can be no middle ground. The criterion of warlike usefulness

and destination has been adopted by the common consent of civilized nations, after centuries of struggle in which each belligerent made indiscriminate warfare upon all commerce of all neutral states with the people of the other belligerent and which led to reprisals as the mildest available remedy.

If the principle which appears to have been declared by the Vladivostok prize court and which has not so far been disavowed or explained by His Imperial Majesty's Government is acquiesced in, it means, if carried into full execution, the complete destruction of all neutral commerce with the non-combatant population of Japan; it obviates the necessity of blockades; it renders meaningless the principles of the declaration of Paris set forth in the imperial order of February 29 last that a blockade in order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and non-contraband goods; and is in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State.¹

The position of the United States on this subject was again stated by Secretary of State Hay in a further communication to the Russian Government on the same subject in 1905, as follows:

If the cargo were condemned on the ground that the neutral claimant had not offered proofs that no part of the cargo could eventually reach the enemy's forces, it would override the universal presumption in favor of innocence by demanding impossible proofs. If proof were required on the part of the neutral claimant to show that the cargo was destined only to pacific uses, to what extent must he adduce proofs? Must he show that none of the cargo would eventually reach the enemy's forces? If proof so comprehensive be wanting, would the whole cargo be condemned? If it were not shown by the captor that the consignee was an agent or contractor of the enemy's government, must proof be offered by the claimant that he will not sell to one who is such agent even though the purchaser might conceal his agency? The law of nations affords no answer to these questions, and it must therefore be presumed that it does not authorize any seizure and condemnation on the mere ground of the possibility of supplies reaching the military or naval forces of the enemy.²

It is evident from the foregoing objections to this decision that the Prize Court was in direct opposition to the Government of the United States in holding that in order to justify condemnation the Crown was not required to show that enemy destination was intended

¹ Foreign Relations of the United States, 1904, p. 762. ² *Ibid.*, 1905, p. 746.

by the shippers, and that presumptive evidence of destination to enemy territory was sufficient.

On this question of the proof of intention and prearrangement on the part of the shippers of the cargoes, it appears from the decision of the Prize Court that on the part of the claimants —

It was argued that the Crown as captors ought to show that there was an original intention by the shippers to supply the goods to the enemy Government, or the armed forces, at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.

This contention was dismissed by the court on the ground that:

If the captors had to prove such an arrangement affirmatively and absolutely, in order to justify capture and condemnation, the right of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory.

The difficulty with this argument is that a belligerent has no right to stop articles of conditional contraband from reaching enemy territory unless it can show affirmatively the existence of a prearrangement such as that referred to. Unlike articles of absolute contraband, articles of conditional contraband, when shipped to enemy territory, are innocent unless there is shown to be an intention of enemy destination, in addition to mere destination to enemy territory. This essential difference as to the contraband character of articles listed as absolute contraband, and articles listed as conditional contraband, furnishes the explanation of why in the Declaration of London, the doctrine of continuous transportation was adopted as to absolute contraband, but not extended to conditional contraband.

As stated in the extracts above quoted in Secretary Hays' communication on this subject, shippers of conditional contraband are under no obligation to prove that no part of the shipment may eventually come to the hands of the enemy forces, which would be not only to override a substantial principle of the law of nations, but also in most cases would be to demand "impossible proofs." Any other rule would permit condemnation on presumptions against the shippers drawn from mere possibilities, and the law recognizes that such presumptions will

inevitably be drawn in times of prejudice and suspicion. That the temptation to draw such presumptions is too strong to be resisted was well illustrated by the reasoning of the court in this decision, and the unjust burdens thus imposed upon neutral commerce demonstrates the wisdom of the Declaration of London in rejecting the doctrine of continuous voyage so far as conditional contraband is concerned in the present state of the law.

Moreover, the court seems to have overlooked the point that inasmuch as none of the shipments of foodstuffs in these cases came within the particular provisions of the Orders-in-Council of August 20 or October 29, 1914, which undertook to impose the burden of proof upon the claimants, they were entitled to rely upon the assurances given by the adoption of those orders, that the provisions of the Declaration of London not modified by those orders would be observed by the British Government. In other words, they are entitled to invoke the protection of the provisions of Articles 33, 34, and 35 of the Declaration which are of benefit to them, and the effect of which was to impose the burden of proof upon the captor and to establish a presumption of innocence in the absence of certain conditions which did not apply in these cases, and to establish the ship's papers as conclusive proof both as to the voyage upon which the vessel was engaged and as to the port of discharge of the goods.

The court concluded its discussion of these cases by calling attention to a decision in a German prize court as an example of the ease with which "a Prize Court in Germany hacks its way through *bona fide* commercial transactions when dealing with foodstuffs carried by neutral vessels."

In that case foodstuffs were consigned from the United States to Irish ports and were ladened upon a Dutch steamer, and the British Prize Court quoted the following extract from the German Prize Court's decision:

There is no means of ascertaining with the least certainty what use the wheat would have been put to at the arrival of the vessel in Belfast, and whether the British Government would not have come upon the scene as purchaser, even at a very high price, and in this connection it must also be borne in mind that the Bills of Lading were made out *to order*, which greatly facilitated the free disposal of the cargo.

The British Prize Court disclaimed any intention of following this decision, which it characterized as "a shocking example." Nevertheless, there seems to be very little if any substantial difference distinguishing the two decisions, and it is difficult to perceive wherein the court has not followed this "shocking example" in spite of the best intentions to the contrary.

In addition to the objections above pointed out against the international authority of the Orders-in-Council cited in the decision of the Prize Court, the further objection was urged that these Orders-in-Council were of doubtful authority even as municipal law.

While the settlement negotiations were in progress in the Packers cases, the question of the authority and legal effect generally of Orders-in-Council in relation to prize court proceedings came on for argument on appeal before the Privy Council in the *Zamora* case, and the decision of that court, which was rendered contemporaneously with the close of these negotiations, is of particular interest for that reason.

In the *Zamora* case it appeared that specific powers had been conferred upon the King in Council by an act of Parliament authorizing the making of rules as to the procedure and practice in prize courts. But the specific orders which were under review went further than that and undertook to deal with substantial rights of neutrals, as to which no authority had been conferred upon the King in Council by any act of parliament. In that respect the Orders-in-Council in the *Zamora* case and in the Packers cases stood on the same footing. The Prize Court in both cases construed and followed these Orders-in-Council as an imperative direction binding upon the court on the theory that the King in Council was authorized to exercise such powers by virtue of the Royal prerogative.

On this appeal the Privy Council held that the Prize Court was not bound by executive orders of the King in Council unauthorized by acts of Parliament, for the reasons set out in its decision, from which the following extracts are taken:

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that under a number of modern

statutes various branches of the Executive have power to make rules having the force of statutes; but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of common law or equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

In the first place all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign Power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly filed. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations — in other words, international law.

It cannot of course be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court, in giving effect to such provisions, would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. . . . The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive Orders of the King in Council.

On July 7, 1916, three months after the decision of the Privy Council in the *Zamora* case, the Order-in-Council relied upon in the decision by the Prize Court in the *Kim* case, and all other Orders-in-Council then in force relating to the Declaration of London, were withdrawn by a new Order-in-Council. This order recites that this was done because "the issue of these successive Orders-in-Council may have given rise to some doubt as to the intention of His Majesty, and also as to that

of his allies, to act in strict accordance with the law of nations," and declares that it is and always has been their intention to exercise their rights in accordance with the laws of nations; and then it sets out a series of rules which are ordered to be observed, pointing out that this is done because, on account of the changed conditions of commerce and diversity of practice, doubts might have arisen as to the rules which they regard as being in conformity with the law of nations.

This Order-in-Council, like the previous ones, is not based on the authority of any specific powers conferred by act of Parliament upon the King in Council, and the rules set out in this order do not differ materially from the rules embodied in the previous orders, except that the new order does not refer to the Declaration of London. The new order does differ radically from the old orders, however, in its application to neutral rights, because it was adopted after the Privy Council decision in the *Zamora* case, and therefore must be read in the light of that decision, and also because the reason embodied in it, as above noted, explaining why it was adopted, shows that it has an entirely different purpose from that of the previous orders. As was recognized by the Privy Council in the *Zamora* case, if the rules adopted in an Order-in-Council conform to the law of nations, the order is quite unnecessary to give them effect, and if they conflict with the law of nations, the order cannot make them binding upon a prize court, so far as the rights of neutrals are concerned. This was not recognized by the British Government when the earlier orders were adopted. The *Zamora* decision made it clear, however, and so in this later order a special reason for its adoption was stated, namely, that the issue of the previous orders had given rise to doubts as to the intention of the British Government and their allies to act in strict accordance with the law of nations, and it was accordingly explained in the order that the rules which were then adopted were regarded by the British Government and their allies as being in conformity with that law. In the circumstances this amounts to a distinct recognition that these rules depend for their enforcement in the Prize Court, not upon their adoption by an Order-in-Council, but upon their conformity with the law of nations.

It is clear, therefore, that in accordance with the settled rule followed by the Privy Council in the *Zamora* case, this Order-in-Council

cannot detract from the established rights of neutrals under the law of nations, and in so far as the rules adopted by it are found to be in conflict with the law of nations, they will not be binding upon the Prize Court, and if followed by the Prize Court, the Government of the United States, as announced in its communication above quoted of July 14, 1915, "will not recognize the validity of prize court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law."

It should be said in closing that in the negotiations for a settlement of the Packers cases, the British Government demonstrated their desire to deal justly and reasonably with questions of difference of a legal nature arising out of their interference with neutral trade under these Orders-in-Council, and when this last Order-in-Council was communicated to the Government of the United States, it was accompanied by a Foreign Office memorandum which closes with the following reassuring declaration:

These successive modifications may perhaps have exposed the purpose of the allies to misconstruction; they have therefore come to the conclusion that they must confine themselves simply to applying the historic and admitted rules of the law of nations.

The allies solemnly and unreservedly declare that the action of their warships, no less than the judgments of their prize courts, will continue to conform to these principles; that they will faithfully fulfill their engagements, and in particular will observe the terms of all international conventions regarding the laws of war; that mindful of the dictates of humanity, they repudiate utterly all thought of threatening the lives of non-combatants; that they will not without cause interfere with neutral property; and that if they should, by the action of their fleets, cause damage to the interests of any merchant acting in good faith, they will always be ready to consider his claims and to grant him such redress as may be due.

Taking into consideration the settlement of the Packers cases, and the decision of the Privy Council in the *Zamora* case, and the subsequent action taken by the British Government in regard to the Orders-in-Council relied upon in those cases, it would seem that the decision of the Prize Court in the Packers cases, although standing unreversed of record, can not fairly be taken as a basis, sanctioned by the British Government for the treatment of neutral commerce.

CHANDLER P. ANDERSON.

THE CASE OF THE "APPAM" AND THE LAW OF NATIONS¹

At the time when the *Emden* and all other German ships had ended their careers on the high seas, and England thought herself safe from the inroads of German cruisers on the ocean, about the middle of January, 1916, the Liverpool liner *Appam* disappeared on a voyage from Dakar, West Africa, to Plymouth, England. This ship had left its port of departure on January 11th and was expected in Plymouth the 21st of that month. After four days, wireless communication with the vessel ceased suddenly, and as nothing was heard of the ship during the following days, it was given up for lost. It was admitted that it had either gone down in a severe storm which had been raging on the West African coast, or had been sunk by a German submarine which had extended its radius of action. These assumptions were confirmed by the British steamer *Tregantle*, which on the 16th of January passed a damaged life-boat having on its stern the name *Appam*. The risks on the *Appam* rose to 75 % in London, and no hopes were had as to the fate of the passengers, among whom were the Governor of the British colony of Sierra Leone and his wife.

On the first of February, 1916, a ship entered the harbor of Norfolk, Virginia, which flew from its masthead the German battle flag. It was the *Appam*, now a German prize with a German prize crew on board. A German auxiliary cruiser, the *Moewe*, disguised as a tramp liner, sailed through the North Sea and on the very lanes of travel of English ships until she reached the high seas, where, unknown to the enemy, she preyed upon British merchant ships. Six larger vessels had been taken near the northwest African coast between the 11th and 13th of January, when the *Appam* appeared on the 15th of that month. The *Moewe*, disguised as a tramp, approached the British vessel, and when within range, the German battle flag rose on the *Moewe*, and the guns stood in position. The *Appam*, which possessed

¹ Translated from the German by Carlyle Reginald Barnett, of New York City.

only one three-inch gun, soon surrendered. The *Moewe* placed 138 people whom she had taken off destroyed prizes, as well as a prize crew of 22 men under the command of Lieutenant Berg, on board the *Appam*, and with these and 20 other Germans who had been captured in Africa and were being taken to detention camps in England, the *Appam* was taken across the Atlantic Ocean, a voyage of 3400 miles, without being seen by the British cruisers engaged in patrolling the Atlantic coast of the United States. Thus, on February first, the *Appam*, under the guidance of 42 Germans, with some 400 Englishmen, sailed into Norfolk harbor, flying the German flag.

The case of the *Appam* attracted notice not only because of the unheard of boldness which caused this British ship to be taken as a German prize into an American harbor, but also because of the complicated legal questions which stamped this as one of the most remarkable cases of international law. The matter became more involved because of the efforts of the British Government and the former English owners to regain possession of the *Appam*. The British Government sought to attain its end through diplomatic channels and asked, through its Ambassador at Washington, that the American Government should free the ship, return the *Appam* to England, and intern the German prize crew on the basis of Article 21 of the XIII Hague Convention of 1907. The former English owners, the Elder Dempster Company, Ltd., and the parent line of this company, the British and African Steam Navigation Company of London, instituted legal proceedings, and a libel was filed in the United States District Court at Norfolk, Va.²

Without entering into any criticism of the conduct of the American Government in regard to the British diplomatic action, or of the District Court on the commencement of legal proceedings in regard to the *Appam*, an objective consideration of the case assumes various aspects, which will be discussed in detail in the following pages.

I

As is well known, efforts have been made in recent times to improve the existing chaotic conditions of international public maritime law

² Since this article was written, this case has been decided by the Supreme Court of the United States, which has ordered the *Appam* returned to her British owners. The decision is printed *infra*, p. 443. — Ed.

which boasts of but very few generally recognized rules. To this end, a series of legal rules in more or less codified form were agreed upon at the Hague Peace Conferences of 1899 and 1907, the last in particular, and at the London Naval Conference of 1908-9. If these had been recognized and obeyed in place of the former imperfect body of maritime law, they would have made a most important series of legal principles covering the law of the sea. These agreements, however, as between sovereign states, do not become valid and binding by a majority vote of the conferences, but are only valid as to those states which submit to them by means of an international declaration with the Netherlands as "Trustee" for the Hague Conventions, and with Great Britain as "Trustee" for the London Naval Convention, and only then when all belligerent nations are parties to the compact. The XIII Convention of the Second Hague Conference of October 18, 1907, contains the following in Articles 28-30, in reference to the rights of neutrals in case of a naval war: The stipulations of this agreement are to hold good only as to the parties thereto and then only finds acceptance if all the Powers engaged in war are parties to it, and that ratifications of the same are deposited with the Government of the Netherlands at the Hague; and Powers that have not signed the agreement can accede to the same by official notice to the Government of the Netherlands with a declaration of accession annexed to the same.

As is well known, the English Government had not up to the beginning of the present war ratified the provisions of the London Naval Convention which gathered at the call of the British Government, so that as far as this war is concerned, they are not applicable. Also by a later, though only a partial ratification, and then not in the proper form, England could not obtain international recognition of the Declaration of London in the face of Article 65, which stated that the provisions of the Declaration must be treated as a whole and could not be accepted in parts. The XIII Convention of the Second Hague Conference has not, on the other hand, ever been ratified or in any other way been recognized by the British Government. England has not accepted this convention, because there must first be a change in English municipal law in order to bring it in accord with these international principles. But when the House of Lords rejected the Lon-

don Declaration which had been confirmed by the Commons, it became apparent that Great Britain did not desire to embark on a course of international legislation, but rather to regard international questions solely from an English point of view. The failure of the American proposal made at the beginning of the war for a general recognition of the London Declaration so that maritime law should have a definite status during the progress of the war, may be ascribed to the same reason.

In so far as rules are concerned, those contained in the declaration and convention referred to can only be recognized as rules of law to the degree that they were looked upon as such previous to the inception of the said declaration and convention. As far as the *Appam* case is concerned, only a very few of those provisions are recognized internationally. On the contrary, one finds almost everywhere opposing principles of national law and particularly international law, especially, the divergent views of the Anglo-American and Continental European systems. The Anglo-American conception is peculiar in that it is inclined to take its version as the standard and have the other nations recognize such as the true rule.

The claim of the British Government on the United States in regard to the *Appam* case is founded on the position of the latter as a neutral and its duties as such toward prizes of war taken into American harbors. The XIII Convention of the Second Hague Conference contains detailed provisions in Articles 21-26 for such a case, but, as has been shown above, these can only be regarded as proposals *de lege ferenda*. These interesting questions have not been touched upon in the Declaration of London, and as the mentioned regulations of the Hague Convention have been rejected as rules of international law, it is unnecessary to discuss here how far these intended general provisions take precedence or make way for particular international law, as they are only to be considered as valid if agreed upon between individual nations.

There was no generally recognized law of prize in international law. The treaty between the United States and Germany made provision for this discrepancy. According to international law, a neutral nation could either permit a warship to bring her prizes into port or refuse admittance. In the absence of an express prohibition, permission to

enter was implied.³ Once in the harbor, a neutral state could limit the stay of such warships and prizes. Failure to set a time limit implied a right of indefinite asylum. Private vessels of belligerent ownership could remain any length of time in neutral ports, but it became customary to place a limitation on warships, although such procedure was not generally recognized. This time limit could be modified or completely disregarded by treaties between individual states. In such treaties, which were quite numerous in the eighteenth century, the high contracting parties mutually promised each other not only to receive into their ports prizes of the other, but also to refuse such a right to enemies of the several parties to the agreement.

This took place in the Franco-American Treaty of 1778 (Art. 19),⁴ to be considered hereafter. On the other hand, the time limit set on reception took its inception from the limitation placed on prizes taken into port by privateers which, according to the French law, in case of distress at sea or evasion of one's enemy, was limited to 24 hours.⁵

Similar treatment was accorded a prize either when entering a neutral harbor in charge of a prize crew or accompanied by a warship. In the latter case the regulations for the stay of prizes were also applied to the escorting warship. Both were, therefore, placed on the same footing. It is quite apparent that this question and the course of conduct in the individual case depended entirely upon the presence of the prize. Westlake gives as a reason for the irregular treatment of prizes and warships, that conflicts on board the prize between the prize crew and the crew of the ship and, in the case where the ship was taken into port by a warship, fear of a conflict between the two ships, entitled a neutral country to refuse entrance of prizes to its harbors.

The continued possession of prizes, while in a neutral harbor, also implied the use of force over the captured crew. The neutral state, according to prevailing legal conceptions, could not interfere with this possession without placing itself in opposition to the principle of the

³ Wheaton, *Elements of International Law*, 2d ed. by Lawrence, p. 726; Hall, *A Treatise on International Law*, 5th ed., p. 985.

⁴ Wehberg, *Seekriegsrecht*, *Handbuch des Völkerrechts*, Vol. 4, p. 441; Moore, *Digest*, Vol. 5, sec. 821, p. 588; Wheaton, *Elements*, pp. 490 (note 165), 711.

⁵ Westlake, *International Law*, Part 2, p. 214.

exterritoriality of prizes, and the use of force between warring Powers could not, on theory, be permitted in neutral waters.⁶

Perhaps the maritime rule of 24 hours for warships getting the start of other warships upon departure from a harbor was derived from the 24-hour rule for prizes, namely, that a certain time must elapse before a belligerent warship might leave a neutral port to pursue another belligerent warship which had previously left the same port. However, there has been no unanimity of opinion reached on this even to the present time. The Continental, and, in particular, the old French principles of law were directly opposed to the English rules on the question.

According to the French law, a neutral Power had the right to allow the warships of a nation engaged in war to remain an unlimited time within its harbors, a rule which France adhered to constantly.⁷ This is evident from her conduct in the Russo-Japanese War. The Russian fleet, which had no prizes, was not limited as to any time while in French ports. Therefore, the French law remained as before, setting a time limit of 24 hours only on warships accompanied by prizes; the stay of warships without prizes was not limited to any prescribed period.

In opposition to this there prevailed, according to the English principle, a limitation on departure of twenty-four hours for warships of Powers at war. This rule was applied by England toward Russia in the Russo-Japanese War, in direct opposition to the conduct of France on the matter.

Warships with prizes, as likewise prizes alone, were, according to this principle, refused admittance to neutral harbors, except in the case of distress at sea.⁸ Spain and Brazil followed the English rule, whereas Italy, the Netherlands, Belgium, Denmark and Japan favored the French rule.⁹ Therefore there could be no question at the Hague Conferences of a universal principle of international law as regards the stay of warships or prizes, with or without escort, in harbors of neutral nations. The overwhelming rule, however, and in fact the representative American principle, was that in case of no prohibition warships

⁶ Westlake, *International Law*, Part 2, pp. 213-214.

⁷ *Ibid.*, p. 213. ⁸ *Ibid.*, p. 214. ⁹ *Ibid.*, p. 214.

could send their prizes to neutral ports. This became the legal American rule in the Bergen Prize Cases with Denmark in which Mr. Wheaton in 1843 said, in a note to the Secretary of State:

If then there was an express prohibition in this case, and if there was no treaty existing between Denmark and Great Britain by which the former was bound to refuse to the enemies of the latter these privileges (and I suppose there was no such prohibition or treaty), then the American cruisers had an unquestionable right to send their prizes into Danish ports. . . . When once arrived there, the neutral government of Denmark was bound to respect the military right of possession, lawfully acquired in war by the captors on the high seas and continued in the neutral port into which the prize was brought.¹⁰

As is seen, Wheaton made no distinction whether the warship brought the prize into a neutral port or whether the prize was brought to a neutral port manned by a prize crew from the captor vessel. Likewise, he considers the application to this case of the Franco-American treaty of 1778 which in Article 19 uses the expression "carry into the ports," and he declares that France thereby obtained the following rights against America: (1) *Admission for her prizes and privateers* (exclusively); (2) admission for her public vessels of war into our ports, in case of stress of weather to refresh, victual, repair (not exclusively).¹¹

The prize, as such, is to be granted admittance and the manner in which she is carried into port depends solely on the military discretion of the captor. The right of admission is different for prizes and for warships. Attorney General Cushing, in an opinion rendered in 1855, declared that the right of asylum is presumed where it has not been previously denied.¹²

In the case of the Schooner *Exchange* (1812), in which the principle of extraterritoriality of foreign warships was first given general recognition in the United States, Chief Justice Marshall said:

In the absence of any prohibition, the ports of a friendly nation are considered as open to the public ships of all Powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.¹³

¹⁰ Moore, Vol. 7, sec. 1314, pp. 982-983.

¹¹ *Ibid.*, pp. 982-983.

¹² *Ibid.*, p. 985.

¹³ Moore, Vol. 2, Sec. 254, p. 576.

The literature on the subject of prizes was not unanimous. On one hand it allowed complete unlimited stay; while on the other hand, admittance was only to be had in case of distress at sea. Even the members of the Institute of International Law have uttered the most diversified opinions in regard to this matter.¹⁴

In so far as it is a question of the present state of the law, it may be said that, according to the general conception of writers, in the absence of positive prohibition, warships and their prizes have the right to enter neutral ports and there find shelter and asylum.¹⁵ Although a neutral must treat all belligerents impartially during the continuance of such a prohibition, it is deemed permissible to grant a nation by a treaty made previous to a war the right of asylum in a neutral port, and in the same way a treaty may be concluded to deny such a right to whatever nation might be at war with one of the contracting parties.¹⁶ Such a different treatment of belligerents, in regard to the bringing in of prizes, was provided in Art. 19 of the treaty of 1778 between France and America, as has already been mentioned.¹⁷

In short, during the period between the seventeenth and nineteenth centuries, all disadvantages and restraints attending the entrance of prizes into neutral ports were applied to warships accompanying these prizes. The first and decisive feature was the presence of the prize which, if granted little or no period of stay in port, communicated similar limitations to warships which accompanied such prizes.

¹⁴ Wehberg, *ibid.*, p. 441; *Annuaire de l'Institut*, Vol. XXIII, pp. 86, 87, 136, 143, 148, 156, 166 ff.; Wheaton, pp. 725-726, note 1 on p. 726.

¹⁵ Hall, p. 642; Wheaton, p. 197; "If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or against the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place. If there be no treaty applicable to the case, and the sovereign from motives deemed adequate by himself permits his ports to remain open to the public ships of friendly Powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent." See Vattel, *Droit des Gens*, liv. IV, ch. 7 sec. 12.

¹⁶ Wheaton, p. 726.

¹⁷ Wheaton, p. 490 (note 165), 711; Moore, Vol. V, sec. 821, p. 588.

As the right of neutral states to refuse entrance to their harbors to prizes of belligerents, whether accompanied by warships or not, was recognized if there was no treaty holding the contrary between the parties, it became necessary for each state, in order to secure the right of asylum in foreign states; as well as the exclusion of those of a possible enemy, to enter into a treaty to that effect similar to the treaty between France and America of 1778. Accordingly, all international treaties of that time with reference to rights on the high seas contain an agreement in regard to the bringing in of prizes, and partly as an exclusive privilege, as in the exclusion of the future opponent in the Franco-American Treaty of 1778, partly as a simple privilege, as in the Prussian-American Treaty of 1799. Certain definite provisions of this convention are embodied in the later treaty of May 1, 1828, and bind both the German Empire and the United States. The stipulations of both the French and Prussian treaties are in other respects, as we shall see, similar, even to the very phrasing of the two.

The right to take the prize into harbor manned by a prize crew was comprehended under the right to take such a prize into a neutral harbor, as it was entirely within the power of the captor to decide according to military necessities whether he should send the prize in in charge of a prize crew or convoy it himself, and it was understood that the decision of this purely military question was entirely out of the sphere of the neutral state into whose harbor the prize was to be brought.

The general opinion which Wheaton, as already mentioned, considered undisputed was that prizes could be taken in by a prize crew and need not be accompanied by the warship. This opinion the American Government acted upon in instructions to its warships in its last great naval war with England in 1812. All enemy prizes, except in extraordinary cases, were ordered to be destroyed and were not to be sent to a friendly port, for the reason that the delegation of a prize crew to take the prize into a harbor would decrease the fighting force of the captor and thus weaken the offensive and defensive strength against the enemy, and because the destruction of the enemy's commerce to the greatest extent possible was the object of naval warfare.¹⁸

¹⁸ Hall, p. 475: "Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send

In instructions of June 5, 1813, to Lieutenant Allen of the *Argus*, it was stated:

Indeed, in the present state of the enemy's force, there are very few cases that would justify the *manning* of a prize, because the chances of reaching a safe port are infinitely against the attempt, and the weakening of the crew of the *Argus* might expose you to an unequal contest with the enemy.¹⁹

In instructions of the 19th of September, 1813, to Captain Charles Stewart of the *Constitution*, it was declared:

The destruction of the commerce of the enemy is the main object. . . . Therefore, unless your prizes shall be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to *send them in*. . . . The crew and safety of the ship under your command *would be diminished and endangered* . . . by hazarding a battle after the reduction of your officers and crew by *manning prizes*.²⁰

In instructions to Commander George Parker of the *Siren* of December 8, 1813, it was stated:

A single cruiser, if ever so successful, *can man but a few prizes*, and every prize is a serious diminution of her own force, but a single cruiser, destroying every captured vessel, has the capacity of continuing in her full vigor her destructive power so long as her provisions and stores can be replenished. . . . Thus has a single ship upon the destructive plan, the power perhaps of twenty, acting upon pecuniary views alone; and thus must the employment of our small forces in some degree compensate for the great inequality compared with that of the enemy.²¹

Similar instructions were given to other commanders on December 22, 1813, January 6, February 26, March 3, and November 30, 1814.²²⁻²³ The result of these general instructions was the destruction of more than 74 British merchant ships.²⁴

The English law (Art. 303 Naval Prize Law), as well as the American law (Art. 50 Naval Code), unanimously justify the destruction of an enemy prize if the captor warship is not in a position to place a prize crew on board to bring her into port for adjudication.²⁵ Also French them in. A single cruiser, if ever so successful, can man but few prizes, and every prize is a serious diminution of her force. . . ."

¹⁹ Moore, Vol. 7, sec. 1212, p. 516.

²¹ *Ibid.*, p. 517.

²⁴ Hall, p. 475.

²² *Ibid.*, p. 517.

²⁵ Wehberg, p. 398.

²⁰ *Ibid.*, p. 516.

²³ *Ibid.*, pp. 516-517.

and English legal practice, although not permitting the general destruction of enemy shipping, considers such destruction as proper, if placing a prize crew on board the captured ship to take her into port would so weaken the captor vessel that its further operations in the course of duty would be hindered,²⁶ and also if the captor ship itself could not convey the prize to port. Lord Stowell says in the case of the *Felicity*:

The captors fully justify themselves to the law of their own country which *prescribes the bringing in*, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to *part with any of their own crew to carry her into a British port*. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property. (2 Dodson, 383.)²⁷

This position, which clearly maintains that the captor cannot be required to delegate a prize crew to take the prize into a home port, is especially worthy of note, because in describing the manner of taking a prize in, the English expression is the same as the one used in the aforementioned Franco-American and Prussian-American treaties, namely, the word "carry."

Before discussing the last mentioned treaty, it must be said that its provisions do not clash with any of the neutrality proclamations of the United States, from which one can indirectly imply the recognition of the binding force of the contents of the treaty by the Government of the United States. During the last 50 years there have been the neutrality proclamation of President Grant of October 8, 1870, at the time of the Franco-Prussian War,²⁸ the neutrality proclamation of President Roosevelt of February 11, 1904, at the outbreak of the Russo-Japanese War;²⁹ and the neutrality proclamation of President Wilson of August 5, 1914, at the beginning of the present war.³⁰ In all these proclamations there are similar announcements which permit the

²⁶ Hall, p. 476, note 1.

²⁷ Hall, p. 476, note 1; Roscoe, Reports of Prize Cases from 1745 to 1859, Vol. II, pp. 235-6.

²⁸ Moore, Vol. 7, sec. 1315, pp. 987-989.

²⁹ *Ibid.*, p. 989.

³⁰ Stockton, Outlines of International Law (1914), Appendix V, pp. 598-601.

stay in neutral ports of belligerents' warships for a period not to exceed twenty-four hours. No prohibition of the bringing in of prizes alone, or under convoy, is mentioned in any of these proclamations. From the above statements and from the past conduct of the United States, this seems to imply that this country is not opposed to the bringing in of prizes into American ports and that the provisions of the Prussian-American Treaty of 1799, in so far as they are reenacted in the treaty of 1828, are still binding on both nations.

That this first treaty between Prussia and America is now binding upon the German Empire, as the successor of Prussia, and upon the United States, is generally acknowledged. This recognition was repeatedly expressed by the participating parties to the treaty. On the outbreak of the American Civil War the Prussian Minister of Commerce issued, on August 16, 1861, to the Chambers of Commerce of Prussia, a circular letter, in which it was clearly announced that this treaty was still binding on the parties.³¹ During the Franco-Prussian War the American Government made reference to certain protectory provisions for American shipping in the treaty of 1799 and of 1828 with Prussia and the newly founded German Empire. In answer Count Bismarck, the Chancellor of the new empire, by a telegram of February 9, 1871, recognized these provisions of the treaty as binding and subsisting between the American Government and the German Empire.³² The validity of the treaty in regard to the German Empire as the successor of Prussia was later officially recognized both on the part of Germany and the United States. The United States had this treaty included among those compiled and printed as official documents in the collection known as "Compilation of Treaties in Force." Germany, through the Chancellor, at a session of the Reichstag of February 11, 1899, gave express recognition to the treaty.³³

The Treaty of 1828 declares (Art. XII) that Article 12 of the Treaty of 1785, famous as the treaty of amity and commerce concluded with Frederick the Great, as well as Articles 13-24 of the Treaty of 1799,

³¹ Niemeyer, *Internationales Seekriegsrecht*, Part II, *Urkundbuch zum Seekriegsrecht*, Vol. I, p. 22.

³² Moore, Vol. 7, sec. 1198, pp. 498-499; Niemeyer, *op. cit.*

³³ Niemeyer, p. 22.

with the exception of the last phrase of Article 19, should be reenacted in so far as no conflicting treaties had been concluded with other nations. Article XIX of the Treaty of 1799, which is still in force, reads as follows:

The ships of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched or put under legal process when they come to and enter the ports of the other party, but may freely be carried again at any time by their captors to the places expressed in their commissions, which the commanding officer shall be obliged to show.

The last clause of this article concerned the Jay Treaty of 1794, which was abrogated by the War of 1812. Because of changed conditions the clause was never reenacted. It read as follows:

But conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger or accident of the sea, they shall be obliged to depart as soon as possible.⁴⁴

It is quite apparent that if it had not been for the intervention of the War of 1812, the *Appam*, a prize taken from Englishmen, would have come under the head of this last clause and would have been deprived of the protection of the other part of Article 19.

On the basis of that part of Article XIX still in force, the *Appam*, as a German prize, had the right to enter Norfolk harbor and remain there as long as the commander thought proper. The meaning of Article 19 is apparent from our previous discussions. The purpose of this stipulation was to grant to either contracting party the right to bring prizes into the harbors of the other, to lay them up there and to prevent the exercise of the right to exclude prizes or limit their stay as recognized by the law of nations. The way in which the prize is to be brought into harbor is not stipulated in this article, but is left to the option of the commander, who decides whether the prize is to be brought in under convoy or by a prize crew. If bringing the prize in under convoy is the only possible way, as England now insists,

⁴⁴ Niemeyer, p. 30.

it is self-evident that this modification of the general rule would have to be expressed in plain words. This article, however, contains no such exceptional stipulation, but on the contrary declares that warships have the right to enter, together with their prizes, in case the other contracting party as a neutral should make use of the right accorded it by international law and forbid or limit the time during which warships of belligerents could remain within its harbors.

As far as the prize itself is concerned, the general expression "come to and enter the ports" clearly shows that the entrance of such a prize, irrespective of the manner in which she is brought into the neutral harbor, should not be hindered in any way. "Carry" means, as has been previously stated, the relation of the prize to the convoying warship, and was, as has also been stated, the generally accepted term for the various ways of designating the bringing in of a prize by a warship. It is necessary at this point to refer to the use of this word in the Franco-American Treaty of 1778 and in the decision of Lord Stowell in the case of the *Felicity*. A comparison of Article XVII of the Treaty of 1778 with Article XIX of the Treaty of 1799 shows nearly an exact repetition of the former article, except that part which concerns the exclusion of prizes of an opponent of the other contracting party, which is not discussed. There it is also stipulated that "the ships of war and privateers of either party might in time of war freely carry their prizes into the ports of the other party"; that such prizes, when so brought in should not be subject to "search" or to "examination" as to their "lawfulness"; but that they might be taken away "at any time to the places expressed in the commission of their captors, which commissions the commanding officer of such vessel shall be obliged to show." Lord Stowell's decision containing the same expressions to designate the form and manner of bringing a prize into port has already been cited.

The next consideration is whether the *Appam* presents a case of a prize contemplated by the Treaty of 1799. The treaty gives no indication as to what constitutes a prize, but, like the Treaty of 1778, restrains, on the other hand, the courts of the state granting asylum from examining the legality of the capture. In this respect the Treaty of 1799 says, "nor shall such prizes be arrested, searched, or put under legal

process," while the treaty with France of 1778 declares, "nor shall the searchers or other officers of those places search the same, or make examination concerning the lawfulness of such prizes." The outward indications of the capture suffice, namely, possession, and the national flag of the captor on the prize, which, when the seizure is made by a warship, gives military possession to the nation of the captor. The flag, especially, gives the prize the character of a ship which has always belonged to the captor so far as the reception in a neutral harbor is concerned.³⁵ Upon the capture of a ship that belongs to the subject of an enemy state both possession and title is immediately transferred to the captor state,³⁶ a rule of law which has always been recognized by the American courts.³⁷ This is so stated in a review which Wheaton makes in one of his volumes on Judge Story's decisions in regard to American prize law at the time of the War of 1812: "As between captor and captured, the property is divested instantly on capture." This, in its application to the question of the transfer of title, is founded on appropriation and continuous possession by the captor warship as a military act in behalf of the state. The result is that the prize, by reason of its military character, assumes the status of a public vessel of the captor state, and is in the same class as war ships. In regard to this question there is not the least doubt in theory nor in practice. Wheaton, who was the representative of America in the Bergen controversy with Denmark, says in a despatch of November 10, 1843, to the Secretary of State:

When once arrived there (the ports of Denmark), the neutral Government of Denmark was bound to respect the *military right of possession* lawfully acquired in war by the captors on the high seas and continued in the neutral port into which the prize was brought.³⁸

Wheaton says in his *Elements of International Law*, in reference to contemporary, particularly American, literature:

And though the prize was in fact within a neutral jurisdiction, it was still to be considered as under the control of the captor, whose possession is considered as that of *his sovereign*.³⁹

³⁵ Westlake, Vol. II, p. 213.

³⁶ Wehberg, p. 316.

³⁷ Wheaton, p. 972.

³⁸ Moore, Vol. 7, sec. 1314, pp. 982-983; Wheaton, p. 42 (note).

³⁹ *Ibid.*, p. 671, and note 1.

Lawrence, in his edition of Wheaton, Appendix 4, cites on this question the Danish jurist Tetens, who, referring to the maritime ordinances of Louis XIV of 1681, under which the limitation on the admission of prizes was first enacted, says of the instance where extraordinary permission may be given to bring in prizes:

The captor, who avails himself of such a permission, does not thereby lose *the military possession of the captured property*, which gives to the prize courts of his own country exclusive jurisdiction to determine the lawfulness of the capture.⁴⁰

According to these authorities, it is quite apparent that every prize of a war vessel under the command of a duly accredited officer has the right of exterritoriality. Accordingly, Moore, citing the opinion of Cushing, Attorney General of the United States, on the question of an English warship which brought a Russian prize into San Francisco harbor during the Crimean War, says:

A foreign ship of war, or any prize of hers, in command of a public officer, possesses in the ports of the United States the right of *exterritoriality*, and is not subject to the local jurisdiction.⁴¹

To the same effect is a decision of the English Court of Appeals, cited by Moore, and referred to hereinafter, p. 294.⁴² This case is likewise cited with approval by Wheaton.⁴³

The leading case in American prize law upon the right of exterritoriality in foreign warships which firmly imbedded this rule in American jurisprudence, was that of the Schooner *Exchange*, decided by Chief Justice Marshall in the year 1812. This case once and for all settles the law for the United States.⁴⁴

To establish military possession of the prize, it is sufficient, as Hall remarks, if each transaction designed by the captor to effect possession and retain it can be carried out with sufficient certainty, but at all events a prize crew must be placed on board,⁴⁵ which was done in the case of the *Appam*. It was formerly a question whether to constitute possession the captured vessel had to be retained for at least twenty-four hours or brought *infra præsidia*, namely, into a home port or into a place where the prize would be safe from recapture, but this question

⁴⁰ Wheaton, p. 962.

⁴¹ Moore, Vol. 2, sec. 254, p. 578.

⁴² Moore, Vol. 2, p. 591.

⁴³ Wheaton, p. 726, note 1.

⁴⁴ *Ibid.*, pp. 575-577.

⁴⁵ Hall, p. 473.

has now receded into the background.⁴⁶ Both of these provisions were fulfilled in the case of the *Appam*, as the facts clearly prove, for the English fleet did not succeed in recapturing the ship previous to its entry into Norfolk harbor.

When the *Appam* entered Norfolk harbor, she came in as the prize of a German warship, under the protection of her right of exterritoriality, in so far as the laws and courts of the United States were concerned, and under the right of asylum granted by the Treaties of 1799 and 1828. It naturally follows from the foregoing statements that in such a case the government of the state to which the prize previously belonged has no claims as of right against the neutral state, either for the restitution or the expulsion of the prize. In regard to the question of a refusal to admit the prize, the discussion concerns only existing right, and not any subsequent obligatory *duty*. Neutral duties exist only in so far as a belligerent Power is injured by a failure to perform them, which failure gives rise to a claim against the neutral state. The previous discussion of the existing state of the law has proved that it is within the pleasure of every neutral to determine what course it will pursue in regard to prizes. A breach of neutrality occurs only when the capture of the prize may be regarded as illegal by the neutral state, namely, when the vessel was taken in violation of the duties imposed on the neutral nation.

So far as the situation between the belligerents is concerned, the question of a violation of neutrality cannot arise, as no infringement of neutrality invalidates the capture of the prize.⁴⁷ In this respect there is a unanimity of opinion that the neutral state has the right to interfere only in the following cases: (1) When the prize was taken within the territorial waters or boundaries of the neutral state and the neutrality of that state was in that way violated; (2) when the prize was taken by an armed ship which was either fitted out within the neutral state, or which had, contrary to the rules of neutrality, strengthened her armament within such territory.⁴⁸ A third instance, which is

⁴⁶ Hall, pp. 472-473; Wheaton, p. 653; Westlake, Part 2, p. 156.

⁴⁷ Westlake, part 2, p. 519; Hall, p. 645, note 2, *The Anne*, 3 Wheaton, 446.

⁴⁸ Moore, Vol. 2, sec. 254, p. 580; Wheaton, pp. 208, 671, 722; Westlake, Part 2, p. 216; Hall, pp. 644-645.

not recognized everywhere, is where the prize belongs to citizens of the neutral state and was captured in violation of the rules of international law.⁴⁹

The first two cases involve a direct violation of the sovereignty of the neutral state, and in both these instances a duty is imposed on the neutral nation to undo the wrong. It is sufficient to refer here to two cases in connection with these principles; the *Santissima Trinidad* and the *Amistad de Rues*, both decided by the Supreme Court of the United States.

The case of the *Santissima Trinidad* concerned a Spanish ship, captured by armed vessels of insurgents against Spanish rule, who were recognized by the United States as belligerents and who had received a "commission" from the so-called "United States of the Rio de la Plata."⁵⁰ These ships were equipped for privateering within the ports of the United States and in violation of the neutrality of that nation. It involved a question very similar to that in the *Alabama* claims, with the exception that here the United States assumed the opposite rôle, namely, that of the party at fault. The Supreme Court of the United States decided that:

The exemption of foreign public ships, coming into the waters of a neutral state, from the local jurisdiction, does not extend to their prize ships, or goods captured by armaments fitted in its ports, in violation of its neutrality. . . . The tacit permission, in virtue of which the ships of war of a friendly Power are exempt from the jurisdiction of the country, cannot be so interpreted as to authorize them to violate the rights of sovereignty of the state, by committing acts of hostility against other nations, with an armament supplied in the ports where they seek an asylum.

The court ordered the captured goods to be restored to the Spanish owner.⁵¹

The case of the *Amistad de Rues* dealt with a Spanish ship which was captured by a Venezuelan privateer and taken as prize to New Orleans. In this case it was also insisted that the privateer had augmented its fighting force within the United States and that a violation of neutrality had thereby been committed. The United States Supreme

⁴⁹ Wheaton, pp. 671, 725.

⁵⁰ *Ibid.*, p. 975.

⁵¹ Wheaton, p. 208; Moore, Vol. 2, sec. 254, p. 581; Hall, p. 645, note 2.

Court, through Judge Story, gave expression to the same principles that have previously been discussed. Hall says in this regard:

When a vessel is brought or voluntarily comes *infra praesidia* of a neutral Power, that Power has the right to inquire whether its own neutrality has been violated by the capture, and if so it is bound to restore the property.⁵²

We shall refer to both these cases again when we take up the discussion under II, particularly regarding the recovery of possession of property according to regulated proceedings.

In the case of the Bergen Prizes between the United States and Denmark, this country even in the absence of a treaty asserted the same privileges that Germany now maintains in the case of the *Appam*. This case involved three British ships which were captured by the *Alliance*, commanded by Captain Landais, one of the vessels of the American fleet commanded by John Paul Jones, and brought into Bergen, Norway, at that time belonging to Denmark. Upon the request of the British Government, the Danish authorities seized the ships and returned them to England, ostensibly because Denmark had not yet recognized the independence of the United States, and the prizes, therefore, could not be considered legal. The United States took the case up immediately and Franklin requested that the order of restitution of the prizes should be withdrawn or, if it had already been carried out, that their value, which was placed by him at £50,000, should be paid by Denmark to the United States. The Minister, Count Bernstorff, replied evasively without questioning the rights of the United States as a belligerent, and pointed out, as an excuse for the order, the geographical position of England and Denmark, which placed the latter in a position of constraint in matters concerning the former. In the course of negotiations which at the time were being carried on at Paris, the Danish diplomatic representative in Paris, in order to justify the Danish decree, referred to an alleged treaty between Denmark and England, which, however, was never produced. The Danish Government finally offered a certain sum of money as indemnity, which amounted to an acknowledgment of international liability and at the same time a recognition of the justice of the position of the

⁵² Hall, p. 643, with other cases.

United States. This sum of money was not considered sufficient by the United States and the offer was refused. The claim against Denmark has been continued and maintained by the United States up to the present time, especially in the negotiations with Denmark in the years 1812 and 1843. Wheaton, who represented the United States in the latter year, in a despatch to the Secretary of State of November 10, 1843, said:

In the absence of any treaty with England to exclude the prizes of her enemy and of previous prohibition to the United States, by either of which means their prizes might have been refused admission without any violation of neutrality, the United States had a right to presume the assent of Denmark to send them into her ports.

He added:

There was no ground for the application of the *jus postliminii*, which could only take place between subjects of the same state or allies in the war, a neutral state having only a right to interfere to deprive the captor of his possession when the capture has been made in violation of neutral sovereignty, within the limits of a neutral state, or by a vessel equipped there.

In spite of the fact that the United States could not bring about the payment of the indemnity through diplomatic channels, the Government and Congress stood firmly by the position which the United States had assumed in the controversy, and laws were passed which appropriated the requisite prize money to the officers and crews entitled to the same, on the ground that the prizes were legally captured, and as if the indemnity had been paid by Denmark. (Laws of 1806 and 1848, Resolution of 1861.)⁵³

Throughout the whole of the negotiations concerning the Bergen Prizes, the Government of the United States⁵⁴ maintained the position that a neutral state had no right to interfere with prizes which had been brought into its harbors if neither a breach of sovereignty nor of neutrality had taken place. The justice of this rule of law was also

⁵³ Wheaton, notes on pages 41 and 42; Moore, Vol. 2, sec. 1076-1078, Vol. 7, sec. 1314, pp. 982-983.

⁵⁴ According to Resolutions of the Committee on Foreign Affairs of the Senate for 1820, and of the House of Representatives for 1837, the last on a report of the Secretary of State. H. Rep. 2d Sess., 23d Congress, Vol. 2, p. 389; 2d Sess., 24th Cong., Vol. 2, p. 297; Wheaton, Elements, p. 42.

admitted by Denmark because she sought to justify her action to the contrary by pleading a special treaty with Great Britain and claiming that she was bound by particular rather than by general international law.

In the case of the *Appam* the American Government is bound by the course of conduct which it formerly pursued, especially since in view of the circumstances of the *Appam* case the exceptions to the rule do not apply, nor have they even been advanced by the British Government.

Finally, it may be pointed out that the United States has itself applied these fundamental rules within its own dominions in the case of the British prize, previously mentioned, namely, the Russian ship *Sitka*, which was brought into San Francisco harbor during the Crimean War under control of a British prize crew as the prize of a British warship. This case, as regards outward circumstances, corresponds to the case of the *Appam* in every detail. At that time a judge of a local court of California issued a writ of *habeas corpus* to test the legality of keeping the Russian crew of the prize prisoners within an American harbor. In the case of the *Appam* the British crews were likewise kept prisoners on board by the German prize crew, and their release, as in the case of the *Sitka*, was refused by the captor commander.

In the case of the *Sitka*, the English commander sailed away with ship and prisoners without paying any attention to the judicial order, and thus left the jurisdiction of the State of California. Upon complaint of the Governor of California to the President of the United States as "for a public wrong to the judicial and political authorities of the State," the Federal Government, which was in doubt as to whether a cause of complaint existed against England, requested the Attorney General of the United States for an opinion on the question, and he replied as follows:

I cannot say that, in my opinion, it was the duty of the commander of the *Sitka* to remain in port to answer to the (order?) of a court having no jurisdiction of the issue; especially if there was any danger of his lawful prisoners being taken away from his custody by such process.

Belligerent ships of war, privateers, and the prizes of either, are entitled, on the score of humanity, to temporary refuge in neutral

waters from the casualties of the seas and war. By the law of nations, belligerent ships of war, with their prizes, enjoy asylum in neutral ports, for the purpose of obtaining supplies or undergoing repairs according to the discretion of the neutral sovereign, who may refuse the asylum absolutely, or grant it under such conditions of duration, place and other circumstances, as he shall see fit, provided that he must be strictly impartial in this respect towards all the belligerent Powers. Where the neutral state has not signified its determination to refuse the privilege of asylum to belligerent ships of war, privateers or their prizes, either has a right to assume its existence, and enter upon its enjoyment subject to such regulations and limitations as the neutral state may please to prescribe for its own security. The United States have not, by treaty with any of the present belligerents, bound themselves to accord asylum to either, but neither have the United States given notice that they will not do it, and, of course, our ports are open for lawful purposes, to the ships of war of either Great Britain, France, Russia, Turkey or Sardinia. The courts of the United States have adopted unequivocally the doctrine that a ship of war, or any prize of hers in command of a public officer of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, possesses, in the ports of the United States, the right of extritoriality and is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign. . . . The ship which the captain of the *Sitka* commanded was a part of the territory of his country; it was threatened with invasion from the local courts; and perhaps it was not only lawful, but highly discreet to depart and avoid unprofitable controversy. A prisoner of war on board a foreign man-of-war, or her prize, cannot be released by *habeas corpus* issuing from courts either of the United States or of a particular State. But if such prisoner of war be taken on shore, he becomes subject to the local jurisdiction or not, according as it may be agreed between the political authorities of the belligerent and the neutral Power.⁵⁵

This case speaks for itself, and no further exposition is needed to show that, at the very least, it was impossible, according to prevailing principle in the United States for the Government at Washington, by any action whatsoever to affect the status of the *Appam* as a legal prize of the German Empire, especially by a request for the release of the prisoners held on board. Similarly, the British Government was not entitled to ask the United States to take action where neither of the two before-mentioned cases of breach of neutrality had taken

⁵⁵ Wheaton, pp. 726-727, note 218; Hall, p. 199; Opinions of Attorney Gen., Vol. 7, p. 123, Mr. Cushing, Apr. 28, 1855.

place. The only course open to the United States under international law ⁵⁶ was to order the *Appam* to depart,⁵⁷ but under the treaty existing between the United States and Germany, even this last manner of procedure was closed to the American Government.

II

As previously said, upon the complaint of the former owner of the *Appam*, the District Court at Norfolk, Virginia, assumed jurisdiction of the case. Legal proceedings were instituted, the vessel was libelled, Lieutenant Berg was served with a summons on board the *Appam*, and the notices of judicial seizure were affixed on the masts of the prize in spite of the protests of the commander. It is easily perceived by what has been said that this proceeding of the American court, which was later extended so as to include the sale of the goods on board the prize, was contrary to both international and American law. According to American opinion, and the decisions of the Supreme Court at Washington the law of nations has always been a part of the law of the land and its principles are law in the United States the same as the private law developed within the States themselves. This view is contrary to German public law and that of most other states, for according to these nations, the tenets of the law of nations are applicable within a state only in so far as they are expressly recognized by some legal source as part of the law of the individual state. But as the law of nations is, according to American opinion, of binding force in the United States, an exposition of the principles of international law is sufficient to ascertain the law of the American Republic. According to this, the international and national principle of extraterritoriality which was expressly stated to be applicable to prizes of war vessels in the case of the *Sitka*, should have restrained the United States court from executing any legal process on board the *Appam*.

According to fundamental principles, the following is apparent:

The *Appam* was under control of a crew composed of men and officers of the German navy; she had been taken into an American port as a prize of war, and was, therefore, to be looked upon by the

⁵⁶ Lee, Atty. Gen., 1797, 1 Op. 78; 8 Hamilton's Works, by Lodge, p. 304; Moore, Vol. 7, sec. 1223, p. 589.

⁵⁷ Moore, *op. cit.*

neutral state as a German prize, and the German Emperor, as the international representative of the Empire, should have been considered the person in possession and the presumptive owner of the prize. Consequently, the proper party against whom to bring an action was the German Empire, not Lieutenant Berg, for the fact that he held a commission and was in possession of the ship did not of itself authorize any legal proceedings against him.

In order to bring legal proceedings against a sovereign state, which Germany undeniably is, in the courts of a foreign nation, certain prescribed rules are fixed by international law which are universally recognized. The principle of the sovereignty of each member of the family of nations makes each one independent of the jurisdiction of each of the other states. It is apparent that the international principle of sovereignty is inconsistent with the idea that another state or the courts of such state can use any form of compulsion against another sovereign nation. Therefore, it may be stated as a fundamental principle that no state can be compelled against its will to appear before the tribunals of another state, and that without regard as to whether the claims against such state arise out of the law of nations, or even national or international civil law. There are two exceptions, however, recognized by international law, namely, that of the *forum rei sitae*, or the jurisdiction over the location of the *res* or thing in question, when the place of the controversy concerns an immovable thing located in a foreign state; and also the less generally recognized *forum hereditatis*, or the jurisdiction of the inheritance, when the subject in controversy is an inheritance in regard to which jurisdiction is given to the foreign state. This latter right is also well-founded in international private law. The principle of *forum prorogatum*, or jurisdiction on the basis of an agreement, occasionally referred to, is simply figurative in the sense now referred to, because in such a case the legal proceedings take place before the foreign court with the express consent of the state, and the idea of force and compulsion is not present. The same is true where a state itself brings an action in the courts of another state.

These principles are recognized everywhere.

The theory of the German law is recapitulated by Michelsen in the following words:

It is inconsistent with the equality of nations that a state must appear before the tribunal of another state. An exception is made in the two following cases:

(a) In all legal controversies which involve questions of real property, the courts of the country in which the property is located may assume jurisdiction.

(b) A state submits willingly to the tribunal of another state when the action itself is begun by such state. This does not give the right to set up a counterclaim against the plaintiff state (Prozess, "Anhalt"). Public property in the interior of a country is not thereby subject to execution.⁵⁸

These same principles, including the *forum hereditatis*, before mentioned are further developed in the arbitration by the law faculty of the University of Berlin of the controversy between Roumania and Greece, involving the so-called Zapp'sche Inheritance.⁵⁹ They also came before the Berlin courts not so long ago for application to the sequestration of money which the Russian Government had placed with a Berlin bank in favor of a German creditor of that government.

The English views on the question are set forth by Westlake as follows:

In England the king may sue but cannot be sued in the ordinary course of justice; a claim against the crown is made by the extraordinary method of a petition of right. And a foreign state or sovereign cannot be made a defendant in an original suit on a personal claim, though it or he may sue, and will then be subject to all the proceedings in defence which could be taken against a private plaintiff. On the continent the opinions of jurists and the practice of the courts vary.⁶⁰

The English Court of Appeals has, accordingly, in a case involving the admissibility of a legal civil proceeding against a Belgian mail ship which, according to agreement, was placed on a par with a battleship, declared that:

As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign . . . or

⁵⁸ Michelsen, *Völkerrecht*, in the collection *Encyclopaedischer Grundriss der Rechtswissen schaften fuer Chinesen*, pp. 16-17.

⁵⁹ Westlake, Part 1, p. 241.

⁶⁰ *Ibid.*, p. 240.

over the public property of any state which is destined to its public use, . . . though such sovereign . . . or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.⁶¹

The same principle was upheld by the English courts in the decision rendered in the case of *Vavasseur v. Krupp* involving the seizure of shells which the Japanese Government had bought in Germany and which were brought to England for the use of a battleship being built in that country. This "public property of the Mikado" was withdrawn from every legal process by order of the court.⁶²

The same principles prevail in France as in Germany.⁶³

The American position corresponds nearly to the German, even to the denial of the admissibility of a counterclaim without the consent of the foreign state where the latter brings the suit. Moore says in this regard:

An attachment was obtained against the United States of Mexico, in the courts of the State of New York; in respect of certain movable property of the Mexican Government, with a view to secure by that means satisfaction for certain claims. Under instructions of the Attorney General of the United States, the United States District Attorney at New York appeared, and, calling attention as *amicus curiae* to the court's want of jurisdiction, moved that the attachment be vacated. The motion was granted, the court saying that a foreign state could not be sued without its consent and that, so far as jurisdiction was concerned, there was no difference between the sovereign and his property.⁶⁴

The rule "So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and suits against his property" was declared to be the rule in many other cases cited by Moore.⁶⁵

This exemption of a foreign state from the jurisdiction of a court in another state can only be removed by the express consent of the foreign state, and the consent of a representative is not sufficient for this purpose.⁶⁶ The Supreme Court of the United States laid down

⁶¹ Moore, Vol. 2, sec. 257, p. 591; *The Parlement Belge* (Feb. 27, 1880), L. R. 5, P. D., 197, 217.

⁶² *Vavasseur v. Krupp*, L. R. 9, Ch. Div., 351, 354, 359, 360, July 3, 1878; Moore, Vol. 2, sec. 258, pp. 591-592.

⁶³ Wheaton, pp. 199-200, note 69.

⁶⁴ Moore, Vol. 2, sec. 258, p. 592.

⁶⁵ Moore, *op. cit.*

⁶⁶ *Ibid.*, p. 593.

this principle in the case of *Chisholm v. Georgia*, which involved the question whether the State of Georgia possessed a sovereignty distinct from that of the Federal Union, and whether the courts had jurisdiction over the State.⁶⁷ It was, in consequence, necessary to add the Eleventh Amendment to the United States Constitution, taking from the Federal court jurisdiction of suits against one of the United States brought by citizens of another state or by citizens or subjects of any foreign state.⁶⁸

According to American law, there is a still further exception to this immunity of sovereign states. Foreign prizes taken in violation of the neutrality of the United States are subject to the jurisdiction of its courts. Section 7 of the Neutrality Act of 1818 declares that "the District Courts shall take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or the shores thereof."⁶⁹ Moreover, the ordinary Federal courts are the regular prize courts in the United States, in contrast to European regulations which intrust this duty to extraordinary boards appointed by the governments.⁷⁰ In the first instance, the District Court has jurisdiction from which appeals run to the Circuit Court in cases involving more than \$300, and to the Supreme Court if the case involves in excess of \$2000. The limitations on the subject matter have now been increased.

The jurisdiction conferred by Section 7 of the Act of 1818 has been stretched, according to the prevailing American view, to prizes made in violation of American neutrality. Moore says in this connection:

The cases of the *Cassius*, 3 Dallas, 121, and the *Inrincible*, 1 Wheaton, 238, decide that neither a public vessel of another nation, nor its officers, are liable to answer in our courts for a capture on the high seas, but do not touch the question of jurisdiction over her prizes lying in our ports, which extends to libels *in rem* for restitution of such prizes made in violation of our neutrality.⁷¹

⁶⁷ Willoughby, *The American Constitutional System*, New York, 1904 (Amer. State Series), p. 37; *Chisholm v. Georgia*, 2 Dallas 419.

⁶⁸ Willoughby, pp. 172, 288.

⁶⁹ Westlake, Part 2, p. 201.

⁷⁰ Wheaton, *Elements*, Appendix 4, p. 960, *et seq.* especially pp. 968, 969.

⁷¹ Vol. 2, sec. 254, p. 581, also Vol. 2, sec. 258, p. 593; *The Santissima Trinidad*, 7 Wheaton, 283; *The Gran Para*, 7 Wheaton, 471; also Moore, *Int. Arbit.*, Vol. 1, pp. 576-578.

It was not the intention of the statute to deprive the foreign state of jurisdiction, even if it was concerned only in looking into the legality of the capture. The object was simply to obviate the results of a violation of sovereignty by an illegal act, and to return the prize, under such circumstances, to the former owner. For this purpose the courts as the duly constituted authority for the maintenance of the rights of sovereignty of the neutral nation need only to decide the question of the violation of sovereignty. They are confined solely to this question and are excluded from any further adjudication of the subject at hand, such as the assessment of damages, or the like.⁷²

What is a violation of neutrality must be determined from the neutrality proclamations of the Presidents promulgated at the outbreak of wars between foreign states. The neutrality proclamations of Presidents Grant, Roosevelt, and Wilson, the last issued for the present war, are of similar import. There is nothing in any of the proclamations of the present Executive which might be of application to the case of the *Appam*. It is a settled rule, however, that claims arising out of the violation of the principle of neutrality can only be prosecuted by the government of the country of the former owner, and not by the owner himself,⁷³ as is also the corresponding principle that the government of the country whose neutrality has been violated, and not the injured private person, must appear in the prize courts of the belligerent state and ask for the release of the prize.⁷⁴

Judge Story says in this connection (1882):

If the case were entirely new, it would deserve very great consideration whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct interposition of the government itself. But the practice from the beginning of this class of cases, a period of nearly thirty years, has been uniformly the other way and it is now too late to disturb it.⁷⁵

However, in cases involving the more remote breach of neutrality, namely, when the prize is not made within the territorial waters of the neutral state or by a warship making the United States a basis for its operations, but is captured by a ship fitted out within the ports of

⁷² Perels, *Int. Oeffentl. Seerecht*, pp. 302, 304.

⁷³ Hall, p. 645, note 2.

⁷⁴ Wheaton, p. 722; Westlake, Part 2, p. 199.

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admitted by Denmark because she sought to justify her action to the contrary by pleading a special treaty with Great Britain and claiming that she was bound by particular rather than by general international law.

In the case of the *Appam* the American Government is bound by the course of conduct which it formerly pursued, especially since in view of the circumstances of the *Appam* case the exceptions to the rule do not apply, nor have they even been advanced by the British Government.

Finally, it may be pointed out that the United States has itself applied these fundamental rules within its own dominions in the case of the British prize, previously mentioned, namely, the Russian ship *Sitka*, which was brought into San Francisco harbor during the Crimean War under control of a British prize crew as the prize of a British warship. This case, as regards outward circumstances, corresponds to the case of the *Appam* in every detail. At that time a judge of a local court of California issued a writ of *habeas corpus* to test the legality of keeping the Russian crew of the prize prisoners within an American harbor. In the case of the *Appam* the British crews were likewise kept prisoners on board by the German prize crew, and their release, as in the case of the *Sitka*, was refused by the captor commander.

In the case of the *Sitka*, the English commander sailed away with ship and prisoners without paying any attention to the judicial order, and thus left the jurisdiction of the State of California. Upon complaint of the Governor of California to the President of the United States as "for a public wrong to the judicial and political authorities of the State," the Federal Government, which was in doubt as to whether a cause of complaint existed against England, requested the Attorney General of the United States for an opinion on the question, and he replied as follows:

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This case speaks for itself, and no further exposition is needed to show that, at the very least, it was impossible, according to prevailing principle in the United States for the Government at Washington, by any action whatsoever to affect the status of the *Appam* as a legal prize of the German Empire, especially by a request for the release of the prisoners held on board. Similarly, the British Government was not entitled to ask the United States to take action where neither of the two before-mentioned cases of breach of neutrality had taken

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⁵⁶ Lee, Atty. Gen., 1797, 1 Op. 78; 8 Hamilton's Works, by Lodge, p. 304; Moore, Vol. 7, sec. 1223, p. 589.

⁵⁷ Moore, *op. cit.*

neutral state as a German prize, and the German Emperor, as the international representative of the Empire, should have been considered the person in possession and the presumptive owner of the prize. Consequently, the proper party against whom to bring an action was the German Empire, not Lieutenant Berg, for the fact that he held a commission and was in possession of the ship did not of itself authorize any legal proceedings against him.

In order to bring legal proceedings against a sovereign state, which Germany undeniably is, in the courts of a foreign nation, certain prescribed rules are fixed by international law which are universally recognized. The principle of the sovereignty of each member of the family of nations makes each one independent of the jurisdiction of each of the other states. It is apparent that the international principle of sovereignty is inconsistent with the idea that another state or the courts of such state can use any form of compulsion against another sovereign nation. Therefore, it may be stated as a fundamental principle that no state can be compelled against its will to appear before the tribunals of another state, and that without regard as to whether the claims against such state arise out of the law of nations, or even national or international civil law. There are two exceptions, however, recognized by international law, namely, that of the *forum rei sitae*, or the jurisdiction over the location of the *res* or thing in question, when the place of the controversy concerns an immovable thing located in a foreign state; and also the less generally recognized *forum hereditatis*, or the jurisdiction of the inheritance, when the subject in controversy is an inheritance in regard to which jurisdiction is given to the foreign state. This latter right is also well-founded in international private law. The principle of *forum prorogatum*, or jurisdiction on the basis of an agreement, occasionally referred to, is simply figurative in the sense now referred to, because in such a case the legal proceedings take place before the foreign court with the express consent of the state, and the idea of force and compulsion is not present. The same is true where a state itself brings an action in the courts of another state.

These principles are recognized everywhere.

The theory of the German law is recapitulated by Michelsen in the following words:

It is inconsistent with the equality of nations that a state must appear before the tribunal of another state. An exception is made in the two following cases:

(a) In all legal controversies which involve questions of real property, the courts of the country in which the property is located may assume jurisdiction.

(b) A state submits willingly to the tribunal of another state when the action itself is begun by such state. This does not give the right to set up a counterclaim against the plaintiff state (Prozess, "Anhalt"). Public property in the interior of a country is not thereby subject to execution.⁵⁸

These same principles, including the *forum hereditatis*, before mentioned are further developed in the arbitration by the law faculty of the University of Berlin of the controversy between Roumania and Greece, involving the so-called Zapp'sche Inheritance.⁵⁹ They also came before the Berlin courts not so long ago for application to the sequestration of money which the Russian Government had placed with a Berlin bank in favor of a German creditor of that government.

The English views on the question are set forth by Westlake as follows:

In England the king may sue but cannot be sued in the ordinary course of justice; a claim against the crown is made by the extraordinary method of a petition of right. And a foreign state or sovereign cannot be made a defendant in an original suit on a personal claim, though it or he may sue, and will then be subject to all the proceedings in defence which could be taken against a private plaintiff. On the continent the opinions of jurists and the practice of the courts vary.⁶⁰

The English Court of Appeals has, accordingly, in a case involving the admissibility of a legal civil proceeding against a Belgian mail ship which, according to agreement, was placed on a par with a battleship, declared that:

As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign . . . or

⁵⁸ Michelsen, *Völkerrecht*, in the collection *Encyclopaedischer Grundriss der Rechtswissen schaften fuer Chinesen*, pp. 16-17.

⁵⁹ Westlake, Part 1, p. 241.

⁶⁰ *Ibid.*, p. 240.

over the public property of any state which is destined to its public use, . . . though such sovereign . . . or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.⁶¹

The same principle was upheld by the English courts in the decision rendered in the case of *Vavasseur v. Krupp* involving the seizure of shells which the Japanese Government had bought in Germany and which were brought to England for the use of a battleship being built in that country. This "public property of the Mikado" was withdrawn from every legal process by order of the court.⁶²

The same principles prevail in France as in Germany.⁶³

The American position corresponds nearly to the German, even to the denial of the admissibility of a counterclaim without the consent of the foreign state where the latter brings the suit. Moore says in this regard:

An attachment was obtained against the United States of Mexico, in the courts of the State of New York; in respect of certain movable property of the Mexican Government, with a view to secure by that means satisfaction for certain claims. Under instructions of the Attorney General of the United States, the United States District Attorney at New York appeared, and, calling attention as *amicus curiae* to the court's want of jurisdiction, moved that the attachment be vacated. The motion was granted, the court saying that a foreign state could not be sued without its consent and that, so far as jurisdiction was concerned, there was no difference between the sovereign and his property.⁶⁴

The rule "So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and suits against his property" was declared to be the rule in many other cases cited by Moore.⁶⁵

This exemption of a foreign state from the jurisdiction of a court in another state can only be removed by the express consent of the foreign state, and the consent of a representative is not sufficient for this purpose.⁶⁶ The Supreme Court of the United States laid down

⁶¹ Moore, Vol. 2, sec. 257, p. 591; *The Parlement Belge* (Feb. 27, 1880), L. R. 5, P. D., 197, 217.

⁶² *Vavasseur v. Krupp*, L. R. 9, Ch. Div., 351, 354, 359, 360, July 3, 1878; Moore, Vol. 2, sec. 258, pp. 591-592.

⁶³ Wheaton, pp. 199-200, note 69.

⁶⁴ Moore, Vol. 2, sec. 258, p. 592.

⁶⁵ Moore, *op. cit.*

⁶⁶ *Ibid.*, p. 593.

this principle in the case of *Chisholm v. Georgia*, which involved the question whether the State of Georgia possessed a sovereignty distinct from that of the Federal Union, and whether the courts had jurisdiction over the State.⁶⁷ It was, in consequence, necessary to add the Eleventh Amendment to the United States Constitution, taking from the Federal court jurisdiction of suits against one of the United States brought by citizens of another state or by citizens or subjects of any foreign state.⁶⁸

According to American law, there is a still further exception to this immunity of sovereign states. Foreign prizes taken in violation of the neutrality of the United States are subject to the jurisdiction of its courts. Section 7 of the Neutrality Act of 1818 declares that "the District Courts shall take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or the shores thereof."⁶⁹ Moreover, the ordinary Federal courts are the regular prize courts in the United States, in contrast to European regulations which intrust this duty to extraordinary boards appointed by the governments.⁷⁰ In the first instance, the District Court has jurisdiction from which appeals run to the Circuit Court in cases involving more than \$300, and to the Supreme Court if the case involves in excess of \$2000. The limitations on the subject matter have now been increased.

The jurisdiction conferred by Section 7 of the Act of 1818 has been stretched, according to the prevailing American view, to prizes made in violation of American neutrality. Moore says in this connection:

The cases of the *Cassius*, 3 Dallas, 121, and the *Invincible*, 1 Wheaton, 238, decide that neither a public vessel of another nation, nor its officers, are liable to answer in our courts for a capture on the high seas, but do not touch the question of jurisdiction over her prizes lying in our ports, which extends to libels *in rem* for restitution of such prizes made in violation of our neutrality.⁷¹

⁶⁷ Willoughby, *The American Constitutional System*, New York, 1904 (Amer. State Series), p. 37; *Chisholm v. Georgia*, 2 Dallas 419.

⁶⁸ Willoughby, pp. 172, 288.

⁶⁹ Westlake, Part 2, p. 201.

⁷⁰ Wheaton, *Elements*, Appendix 4, p. 960, *et seq.* especially pp. 968, 969.

⁷¹ Vol. 2, sec. 254, p. 581, also Vol. 2, sec. 253, p. 593; *The Santissima Trinidad*, 7 Wheaton, 283; *The Gran Para*, 7 Wheaton, 471; also Moore, *Int. Arbit.*, Vol. 1, pp. 576-578.

It was not the intention of the statute to deprive the foreign state of jurisdiction, even if it was concerned only in looking into the legality of the capture. The object was simply to obviate the results of a violation of sovereignty by an illegal act, and to return the prize, under such circumstances, to the former owner. For this purpose the courts as the duly constituted authority for the maintenance of the rights of sovereignty of the neutral nation need only to decide the question of the violation of sovereignty. They are confined solely to this question and are excluded from any further adjudication of the subject at hand, such as the assessment of damages, or the like.⁷²

What is a violation of neutrality must be determined from the neutrality proclamations of the Presidents promulgated at the outbreak of wars between foreign states. The neutrality proclamations of Presidents Grant, Roosevelt, and Wilson, the last issued for the present war, are of similar import. There is nothing in any of the proclamations of the present Executive which might be of application to the case of the *Appam*. It is a settled rule, however, that claims arising out of the violation of the principle of neutrality can only be prosecuted by the government of the country of the former owner, and not by the owner himself,⁷³ as is also the corresponding principle that the government of the country whose neutrality has been violated, and not the injured private person, must appear in the prize courts of the belligerent state and ask for the release of the prize.⁷⁴

Judge Story says in this connection (1882):

If the case were entirely new, it would deserve very great consideration whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct interposition of the government itself. But the practice from the beginning of this class of cases, a period of nearly thirty years, has been uniformly the other way and it is now too late to disturb it.⁷⁵

However, in cases involving the more remote breach of neutrality, namely, when the prize is not made within the territorial waters of the neutral state or by a warship making the United States a basis for its operations, but is captured by a ship fitted out within the ports of

⁷² Perels, *Int. Oeffenl. Seerecht*, pp. 302, 304.

⁷³ Hall, p. 645, note 2.

⁷⁴ Wheaton, p. 722; Westlake, Part 2, p. 199.

⁷⁵ Hall, page 645, note 2.

this country in violation of neutrality, a suit by the private owner is permissible in the United States courts.⁷⁶

Therefore, the suit in the District Court at Norfolk could be brought only by the British Government. The private party could appear as party plaintiff only in case of the before-mentioned remote breach of neutrality. Even the British Government could bring suit only when the plea was based on a breach of neutrality inherent in the capture. This procedure was not followed in the case of the *Appam*.

Finally, it is apparent that the suit was not admissible because of its object, which was, as cannot be denied, the return to the former English owners of a prize of the German Empire; in passing upon the English demands the American courts would have to pass upon the legality of the capture and that simply because the ship was lying in an American harbor.

Such a claim, according to general, and particularly according to English and American legal rulings, is not one which can be passed upon by an American or other neutral court. The courts of the state of the captor alone have exclusive jurisdiction in regard to the legality of the prize.⁷⁷ The only exceptions to this rule have been discussed. England herself has maintained these principles with the greatest determination. It will suffice, at this point, to mention the familiar controversy with Frederick the Great, who, in order to do justice to his subjects and to remedy what he thought was a wrong done them by English prize courts, levied upon money which was to be sent to England and at the same time instituted a court in Prussia to review the English prize court proceedings. In one of the writings which this celebrated controversy brought forth in behalf of the English, it was said:

The procedure of the King of Prussia was an innovation, which was never attempted in any country of the world before. Prize or no prize must be determined by courts of admiralty belonging to the Power whose subjects made the capture. . . . No crown had the right to pass

⁷⁶ Hall, *op. cit.*

⁷⁷ Perels, *Seerecht*, p. 304; Calvo, *Le Droit International Theoretique et Pratique*, secs. 3041, 3042; Bluntschli, *Das Moderne Völkerrecht der Civilisirten Staaten*, secs. 842, 845; Wehberg, p. 319; Wheaton, p. 669, note 200; pp. 678, 975; Moore, Vol. 2, sec. 254, p. 580; Vol. 7, sec. 1223, p. 588.

upon the legality of a prize made by the subjects of another crown or to attempt to override the judgments of a court of another country. That was uncontroverted international law.⁷⁸

The Supreme Court of the United States, with equal firmness, declared itself in favor of this principle in the case of *The Alerta v. Moran*, in which it was said:

The general rule is undeniable that the trial of captures made on the high seas *jure belli* by a duly commissioned vessel of war whether from an enemy or a neutral, belongs exclusively to the courts of that nation to whom the captor belongs.⁷⁹

Likewise,

The exclusive cognizance of prize questions belongs in general to the capturing Power, and the courts of other countries will not undertake to redress alleged marine torts committed by public armed vessels in assertion of belligerent rights.⁸⁰

This exclusive right is derived from the military right of possession which the captor Power has over the prize.⁸¹ It extends also, and according to Anglo-American jurisprudence, to the prizes in the ports of a neutral Power. This is clearly shown in the following quotation from Halleck:

The Supreme Court of the United States has followed the English rule, and has held valid the condemnation, by a belligerent court, of prizes carried into a neutral port and remaining there, the practice being justifiable on the ground of convenience to belligerents, as well as neutrals; and though the prize was, in fact, within neutral territory, it was still to be deemed under the control or *sub potestate* of the captor, whose possession is considered as that of his sovereign. It may also be remarked, that the rule thus established by the highest courts of England and the United States, is sanctioned by the practice of France, Spain and Holland.⁸²

⁷⁸ Wheaton, pp. 678-679; Trendelenburg, *Friedrichs des Grossen Verdienst um das Völkerrecht im Seekrieg*, Berlin, 1866, p. 12.

⁷⁹ Moore, Vol. 2, sec. 254, p. 580; *The Alerta v. Moran* (Mar. 10, 1815), 9 Cranch, 359, 364.

⁸⁰ Moore, Vol. 7, sec. 1223, p. 588; *The Invincible*, 1 Wheat. 238.

⁸¹ Wheaton, p. 669, note 201, p. 962.

⁸² Halleck, *Int. Law*, Vol. 2, 3d ed. by Baker, p. 405, cited in Moore, Vol. 7, sec. 1224, p. 591.

Phillimore remarks to like effect:

An attentive review of all the cases decided in the courts of England and the North American United States during the last war, 1793-1815, leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of a belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid.⁸³

The valid judgment of a competent national prize court is final as to the question of ownership, and no revision by another court or any other authority is permissible. The case is closed for all time.⁸⁴ It is the English and American practice to designate such a proceeding as conclusive.⁸⁵

However, after such a decision, a settlement through diplomatic channels still remains open, so that if the third state is not satisfied with the judgment rendered, it may resort to diplomacy to solve the difficulty. This is the case, however, only in time of peace, because according to the law of nations, in time of war every duty of granting indemnity between belligerents is suspended. These principles of international law are undisputed, and every government is permitted, when peace is concluded between the parties, to press claims of indemnity against a former opponent.

To return to the question at hand. If the decision of the courts and authorities of a state are regarded as binding outside its territorial jurisdiction, the state rendering such a decision is still answerable for it to other sovereign states in so far as the foreign state considers the decision unfair and seeks redress by methods known to international law, such as payment of an indemnity or some other means of reimbursement. The decision of the court is never disturbed, but the state is answerable for all results which follow from such a decision if it is inconsistent with international law.⁸⁶

Therefore, to return to the controversy of Frederick the Great with England, it may be said that the King persuaded the English

⁸³ Westlake, Part 2, p. 215, who is opposed to this.

⁸⁴ Wheaton, pp. 673, 972.

⁸⁵ Wheaton, p. 972 (the conclusiveness of sentences of condemnation upon the property is cited from the decisions of Judge Story).

⁸⁶ *Ibid.*, pp. 673-675, 681-682.

Government, by means of diplomatic measures, to pay an indemnity to the Prussian Government, and on obtaining the same, Frederick removed the attachment which had been placed on money owing to English creditors, and awarded the indemnity to those Prussian subjects who had been injured by the findings of the English prize court. The efficacy of the judgment in prize, however, was not affected by the negotiations between the two governments.⁸⁷

In conclusion, it may be said as to America that Wheaton, who was the official American negotiator for the adjustment of the difficulty arising out of the capture of American ships and cargoes by Denmark during the Danish-English War at the beginning of the nineteenth century, made these principles the foundation for the American claims and for the subsequent negotiations. He relied upon them, although he recognized the continuing force of the decrees of the Danish prize courts in the several instances as settling the question of the loss and transfer of property in the prize. This did not deter him, however, from insisting that the Danish Government should indemnify the United States as the representative of its injured citizens, because, according to the American point of view, justice had not been done its citizens, and the Danish Government was responsible, according to international law, for the damage occasioned.⁸⁸ This case is not to be confused with the controversy over the Bergen Prizes, mentioned in another connection.

Accordingly, nothing remains for the former English owners of the *Appam* but to await the decision of the German Prize Court, and to leave it to the British Government whether any claims may be brought through diplomatic channels against the Imperial German Government which is responsible for the judgment rendered by its court.

DR. ARTHUR BURCHARD.

⁸⁷ Wheaton, p. 679; Tredelenburg, pp. 8, 16.

⁸⁸ *Ibid.*, pp. 681-682.

THE APPAM CASE

THE arrival of the fine British passenger vessel *Appam* at Newport News on January 31, 1916, in charge of a German prize crew and with about four hundred and fifty British subjects, passengers and sailors, including the Governor of Sierra Leone and some other prominent officials, not only created a picturesque situation, but raised some very important problems of international law.

The activities of the British Navy had practically cleared the seas of German raiders and it was not until the arrival of the *Appam* that the exploits of the German cruiser *Moewe* were revealed. This active and intrepid belligerent, escaping the blockade in the North Sea, had captured and destroyed some fifteen merchant vessels during a cruise lasting several months and finally returned unscathed to her home port in March, 1916. The *Appam* was, when captured off the West Coast of Africa, 1590 miles from Emden, the nearest German port, 130 miles from Punchello in the Madeiras, the nearest available port, 1450 miles from Liverpool, and 3051 miles from Hampton Roads. The *Appam* carried a gun, but she made no resistance to capture. The commander of the *Moewe* placed Lieutenant Berg, an officer of the German Naval Reserve, on board as commander, together with a crew of twenty-two men. Lieutenant Berg placed bombs in various portions of the vessel and informed the officers and crew that in case of any trouble the vessel would immediately be blown up. The German crew did not operate the vessel, but merely navigated her and acted as an armed guard under whose vigilant firearms the British crew and especially the engine room force were kept at work until the vessel came into the harbor of Hampton Roads, where she arrived on January 31, in first-class order, seaworthy and supplied with provisions. The prisoners brought in by the *Appam* were released by the United States Government. Berg reported to the Collector and filed with him a copy of his instructions from the commander of the *Moewe*. These brief instructions were a most

important factor in the case. They directed Berg "*to bring this ship into the nearest American harbor, and there to lay up.*"

Subsequent to the arrival of the *Appam* the German Ambassador informed the State Department that the *Appam* was not an auxiliary cruiser, or a tender, but a prize, and claimed that she should be allowed to remain in an American port in accordance with Article XIX of the treaty with Prussia of 1799. The American Secretary of State in a careful and lucid opinion held that article of the treaty inapplicable and found no warrant in international law for the *Appam's* entrance into an American port.

On February 16th, sixteen days after the arrival of the *Appam* in Hampton Roads, the owner filed a libel to recover the vessel on the ground that she was in American waters in violation of the law of nations and the neutrality of the United States. The Prize Master and German Vice-Consul, appearing as claimants and respondents, claimed on behalf of the German Government that the *Appam* was brought there in reliance upon the treaty with Prussia and, moreover, that under general principles of international law she was entitled to stay an indefinite time in an American port. The institution of prize proceedings in the competent German court was also pleaded, and it was claimed that the American courts were without jurisdiction.

The case was fully tried and argued before the United States District Court, which held that the court had jurisdiction and that the *Appam*, having come into an American port in violation of American neutrality, should be released to her former owners. The case was appealed by the respondents to the Supreme Court of the United States. The holding of that court was that the decisive questions in this case resolved themselves into three:

1. Was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law?
2. Was such use justified by existing treaties?
3. Was there jurisdiction over the *Appam* and her cargo in a Court of Admiralty of the United States?

All of these questions were answered in favor of the owners of the vessel and cargo; the judgment of the District Court was affirmed,

and the interesting and important questions involved set at rest so far as the United States was concerned. The opinion of the court is unanimous and the reasons for its decision are precisely and pithily set forth by Mr. Justice Day. I can here do little more than amplify some of the reasoning of the decision.

A very elaborate argument in both courts turned upon three questions:

(a) The rule of international law as to the treatment to be accorded to prizes in neutral ports prior to condemnation.

(b) The effects of the Prussian treaty upon the status of such ships in American ports, and

(c) The jurisdiction of the courts of the United States to pass upon the question and their power to release the vessel to the former owners.

It was contended by the German Government that under the general rules of international law any nation might permit a belligerent to send prizes into its ports for sequestration and that such prizes might remain indefinitely in such ports without interference from the local jurisdiction. It was admitted that a nation might by proclamation prior to the outbreak of hostilities announce that its ports would not be open to receive prizes, but it was claimed that in any other event prizes should be accorded asylum.

It appears to me that the German contentions ignored the development of international law in this respect, and especially the position assumed by the United States in developing the rights and duties of a neutral. The whole question was fully discussed at the Hague Conference of 1907 and the result was the provisions of Articles 21, 22 and 23 of Convention XIII. These articles read as follows:

ARTICLE 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

ARTICLE 22. A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

ARTICLE 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought

there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

It is clear that had all the Powers ratified these three articles, the United States would have had it in its power to allow vessels to be sequestered in its ports, but this, it would seem, on the face of Article 23, would have required positive action preliminary to the outbreak of hostilities. The action of the United States, however, in regard to this convention was highly significant and emphatically indicates the policy of this nation on the question. The American delegates in their report to the Government stated as to Article 23:

This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse and should not be approved.

The delegates, therefore, refused to approve Article 23, but approved Articles 21 and 22. These articles were ratified by the Senate of the United States and the act of ratification states: "That the United States adheres to the said Convention, subject to the reservation and exclusion of its Article 23."

This demonstrates the view of the Executive and of the Senate, that is, of the treaty-making power, as to the rule approved by the Government of the United States. This action of the treaty-making power is in accordance with the precedents of the United States and with the spirit shown by our government since its foundation in protecting its neutral rights. The rule, however, preventing a belligerent from using a neutral port as a place of deposit for its spoils is an ancient one. It may be found in old French ordinances of the sixteenth and seventeenth centuries. In 1658 the States General of Holland declared in favor of the rule, and "That if any one should act to the contrary, the prize should be restored to the former owner as though it had never been taken."

The distinction found in Article 21 of the Hague Convention is nevertheless always made that a vessel taking refuge from the weather, or when short of provisions, may seek temporary shelter in a neutral port. This is based upon grounds of humanity.

Early rulings of Lord Stowell are to the same effect and the practice of sequestration was condemned by him on the ground that "It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found."

It is interesting to observe that the German Prize Code itself expressly adopts the rules of Articles 21 and 22, for it declares:

A prize may be brought into a neutral port only if the neutral Power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel and supplies. In the latter case she must leave as soon as the cause justifying her entrance ceases to exist.

As long ago as 1866 the rule was admirably stated in Dana's note to Wheaton: "The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in case of necessity, and they may remain in the ports only for a meeting of the exigency."¹

It is true that, as the delegates to The Hague say, certain abuses did arise and that in the eighteenth century may be found bases in which prizes were allowed to be sent into neutral ports for sequestration. This, however, could not be done without the consent, express or implied, of the neutrals, and aside from the treaties shortly to be mentioned, the United States never consented to such a practice.

In principle such asylum is evidently a violation of the fundamental obligations of neutrality. If applied to the present war, it would mean that German submarines operating on our coast might have brought into our ports several hundred belligerent vessels, and thus made our territory the basis from which to carry on their raiding expeditions. This is the view adopted by the great German commentator Bluntschli himself, for he says:

If, on the contrary, the victor brings his prize into a neutral port in order to make her more safe and so that he may fly the more quickly to new conquests, he would be using the neutral territory as a base of operations, which could not be tolerated. The neutral state should then, in order clearly to indicate its intention to remain neutral, refuse the

¹ Wheaton's Int. Law, 8th Am. ed. sec. 391.

entry of its ports to all prizes taken by belligerents unless there is a question of ships in distress.²

Such was the attitude adopted by foreign nations toward the United States during the Civil War. As early as June, 1861, the British Foreign Office instructed the Admiralty that, pursuant to the desire of Her Majesty's Government to observe the strictest neutrality between the United States and the Confederate States, the armed ships and privateers of both parties are interdicted "from carrying prizes made by them into the ports, harbors, roadsteads or waters of the United Kingdom, or of any of Her Majesty's Colonies or possessions abroad." These instructions were rigidly carried out, and similar rules announced by France, Belgium, The Netherlands, Spain, Portugal, and Hamburg and Bremen, then free states. That this was the law and the usual and proper practice of nations appears clearly from Mr. Seward's communication to the Peruvian Legation as to the course the United States would pursue during the war between Spain and Peru: "This government will observe the neutrality which is enjoined by its own municipal law and by the law of nations. No armed vessels of either party will be allowed to bring their prizes into the ports of the United States."

It is difficult to see how, at this late date, this practice, so consonant with common sense, supported by authority, consecrated by long practice and approved by the United States officials and its treaty-making power, should now be put in question.

The German Government during the course of the litigation laid much stress upon the incident of the Bergen Prizes. These were British vessels taken as prizes by Paul Jones and sent into Bergen, which Denmark seized and restored to their former owners on the ground that it had not acknowledged the independence of the United States and the prizes could not be considered as lawful. The prizes were sent into Bergen under stress of weather and for necessary repairs, which might have justified the claim of the United States, but in any event that claim was not acceded to, no arbitration was had, and so far as any precedent at all was created, it was against the right of sequestration.

We must remember that international law is continually in process of growth. Originally the concept of neutrality was of a very vague

² International Law Codified, sec. 778 notes.

character and belligerents refused to recognize neutral rights. During our Revolutionary War these rights were still unsettled. It was the course of the United States subsequent to the Revolution and during the long wars ensuing from the French Revolution which did so much to place on a definite basis the rights and duties of neutrals. This was very clearly indicated throughout the painful controversy with France engendered by the acts of M. Genet in fitting out ships and establishing prize courts in American ports. The treaties with France of 1778 and 1800 contained a provision substantially similar to that contained in the Prussian treaty of 1799 and relied upon by the German Government as justifying the sending of the *Appam* into an American port. Article XXIV of the treaty with France of 1800 and Article XIX of the treaty with Prussia of 1799 are juxtaposed in parallel columns, where their similarity may easily be seen.

Treaty With Prussia, 1799
Article XIX

The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty or of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain no vessel, that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests or any other danger, or accident of the sea, they shall be obliged to depart as soon as possible.

Treaty With France, 1800
Article XXIV

When the ships of war of the two contracting parties, or those belonging to their citizens which are armed in war, shall be admitted to enter with their prizes the ports of either of the two parties, the said public or private ships, as well as their prizes, shall not be obliged to pay any duty either to the officers of the place, the judges or any others; nor shall such prizes when they come to and enter the ports of either party, be arrested or seized, nor shall the officers of the place make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to show. It is always understood that the stipulations of this article shall not extend beyond the privileges of the most favored nation.

Relying upon this treaty, Genet undertook to have French consuls establish prize courts in American harbors and to use such harbors for fitting out privateers to prey upon British commerce. Great Britain naturally protested and much diplomatic controversy ensued. Finally, Mr. Jefferson stated the views of this government, as follows:

The doctrine as to the admission of prizes maintained by the government from the commencement of the war between England, France, etc., to this day has been this: The treaties give a right to armed vessels with their prizes to go where they please (consequently into our ports) and that these prizes shall not be detained, seized or adjudicated, but that the armed vessel may depart as speedily as may be with her prize to the place of her commission; and we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty, no stipulation stood in the way of permitting France to sell her prizes here; and we did permit it, but expressly as a favor not as a right. . . . These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold.

And Mr. Pickering, Secretary of State in 1796, held that the sale of prizes brought by armed ships of the French Republic into our ports was not a right to which the captors were entitled either by the law of nations or our Treaty of Amity and Commerce with France.

Thus, even at a time when the general rule was much less firmly established than at present and when every consideration dictated the most sympathetic treatment of France, prizes even when arriving with their captors were only allowed temporary stay in our ports. The possibilities which might have arisen from giving to the treaty a wider interpretation were vividly impressed upon the officials of Washington's administrations, and had it not been for the firm attitude adopted by them in preventing our ports from being used as a deposit for the spoils of war, we should have been dragged into war long before 1812.

The German Government claimed from the beginning of this litigation that the *Appam* had been sent into Newport News in reliance upon Article XIX of the Prussian treaty. It was quite evident that they intended to make of this a test case. Had they prevailed in their

contentions the United States ports, if the government remained neutral, would have been of the utmost convenience to them in the not improbable event of submarine operations along our coast. Such operations could have been much more effectively carried on here than in the waters surrounding the British Channel and would, in fact, not only have stopped shipping so effectively as to create a blockade here, but would have created for the German Government a fine fleet of merchant vessels for use after the war. It is, therefore, not to be wondered at that the German Foreign Office felt that it had discovered in Article XIX a war instrument of superlative value.

The question was raised *in foro* before the State Department by Count Bernstorff, late German Ambassador. He insisted that the *Appam* was under the treaty immune from the jurisdiction of our courts, and that she might remain sheltered in our ports indefinitely. The State Department gave very careful consideration to the question and held the treaty inapplicable. As it would be impossible to condense the very succinct reply of the Secretary of State, whose statement of the law was approved by the Supreme Court of the United States, I cite it as follows:

At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum of prizes brought into neutral ports by men-of-war it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The *Appam*, however, as your Excellency is aware, was not accompanied by a ship of war, but came into the port of Norfolk, alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privileges of carrying out their prizes again "to the places expressed in their commissions." The commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the *Appam*, the commission of Lieutenant Berg, a copy of which was given to the collector of customs at Norfolk, not only is a commission of a prize master, but directs him to bring the *Appam* to the nearest American port and "there to lay her up." In the opinion of the Government of the United States, therefore, the case of the *Appam* does not fall within the evident

meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of spoils of war in an American port. . . . Under this construction of the treaty the *Appam* can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of war, namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions or necessity of repairs, but to leave as soon as the cause of their entry has been removed.

This ruling of the Department of State thus accords with American precedent as established in the case of the treaty with France, and further emphatically states the general international rule. As the Supreme Court puts it:

Certainly such use of a neutral port is very far from that contemplated, which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government.

On the broad questions of international law, in addition to those heretofore considered, counsel for the German Government, especially in their argument before the Supreme Court, based their claims largely, if not mainly, upon lack of jurisdiction in the court to entertain such a suit. The rights of the British owners, so the argument ran, had been extinguished upon the capture of the vessel, which in itself transferred title to Germany, and, even admitting that the United States might have excluded such vessels as a matter of law or policy from their ports, no court was empowered to restore such a vessel to the original owners, who had lost every scintilla of right and title therein. This argument pressed with vigor, might seem upon superficial examination to present considerable plausibility. It was, however, of a highly technical character and is scarce alluded to in the opinion of the court.

It was admitted that from the beginning of the Republic our courts have taken jurisdiction: (1) In cases of capture in our territorial waters; and (2) In cases where the capturing vessel had fitted out or increased her crew or armament in an American port. The jurisdiction of our courts in this class of cases was directly derived from the Constitution, and not dependent upon statutory enactments. In the famous case of *The Betsey* (3 Dall. 6), decided prior to the enactment of the first

neutrality statute, the Supreme Court held that the Federal Courts had jurisdiction in all such cases, and the proposition has not since been questioned.

It was strenuously endeavored to differentiate these cases on the ground that, as there had been no illegality in the capture, complete title had passed and the original owners were thus deprived of all standing in court, and that the question of prize was one for the German Prize Court, over which it had exclusive jurisdiction. The vice of this argument, however, lay in the assumption that full title passed at the moment of capture. It ignored the fact that while the vessel remained in the condition of a mere prize, recapture might be effected and in the event of recapture the rights of the lawful owner would revert.

From early times it has been held that mere capture is not sufficient to divest the title of the owner. The requirements for such divestment have fluctuated somewhat. Early cases held the rule of pernoctation or twenty-four hours firm possession, but later cases held the rule of *infra praesidia*, and finally the rule now established is that the vessel must be brought within the jurisdiction of the proper prize court and that the rights of the owner are not completely divested until a decision is there had. When a vessel captured by an enemy warship is recaptured, we say that the title of the original owners reverts or is re-established. It might be more exact to say that their right, menaced with extinction by the establishment and perfection of an adverse right, has been freed from this menace; and that the full exercise of their right has again become possible. This construction is more satisfactory; because it is clear that, if the enemy state had acquired full title by capture, recapture would logically vest title not in the original owners, but in their government.

The rule is as old as the *Consulatus Maris*. It could not be better stated than in the opinion of Justice Storey, in the case of *The Star*, 3 Wheaton, 78, 86:

It is admitted, on all sides, by public jurists, that in cases of capture a firm possession changes the title of the property; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture, or on the pernoctation, or on the carrying *infra praesidia* of the prize; it is universally allowed that, at all events, a sentence of condemnation completely

extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign.

This rule is indeed in conformity with common sense. Had the *Appam* attempted to go to the nearest German port it would have risked almost certain capture by British cruisers; it followed the much safer course of traveling more than twice the distance and taking refuge in an American port. It was thus by the interposition of an American port between the *Appam* and the British fleet that the German Government hoped to save the vessel for their future benefit. Had not this illegal use of an American port been resorted to the vessel would in all human probability have been recaptured and restored to its former owners. The rule of law is thus in consonance with the dictates of common sense. Bluntschli himself says:

1. Up to the time when the tribunal has taken jurisdiction and condemned the prize the fate of the latter is uncertain; neither the captor nor his government have as yet rights over the vessel or its cargo, the prize resting up to the date of the judgment merely upon the right of the stronger; the seizure may be annulled by force. This is a special application of the rights of *post liminium* and in *integrum restitutio*.

2. The recapture has effects essentially negative; it annuls the capture (prize). It does not even constitute a new capture (prize). The recaptor must then respect the goods which he has saved from the hands of the enemy and for his service can only claim a recompense.³

And he again states the rule: "The recapture of captured vessels may take place so long as prize courts have not pronounced upon the validity of the capture."

We find upon this point French and German in agreement, for one of the leading modern commentators, Bonfils, formulates the proposition very happily thus:

No. 1416. *Recaptions*. A merchant ship is captured by a hostile war vessel, then recaptured by a war ship of its own nation. What are the effects of this rescue? Do the ship and its cargo revert to their owners, or do they become the property of the recapturing government? From the point of view of jurisprudence this question, it would seem, ought to raise no difficulty. Until the judgment passed upon the validity of the capture shall recognize its legitimacy and shall order the confiscation of the ship and of the cargo, the captor has acquired no right

³ International Law Codified, paragraph 860, notes.

of ownership. The right of the owner who has been dispossessed has been paralyzed but not extinguished. The recaptor can have no more right than those from whom he has recaptured the prize. The owner ought then to re-enter into possession of the property taken from him by violence. Such a decision is logical and in accordance with the spirit of justice.

The solution of this question could be different only if it were assumed that the very fact of capture *per se* transferred to the captor the ownership of the captured ship and cargo. Under this assumption whatever right the original captor had acquired by the capture would pass to the recaptor.

This rule is embodied in the United States Prize Act, U. S. Revised Statutes, section 4652.

It is, therefore, not to be wondered at that the Supreme Court promptly but effectively disposes of the question as follows:

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It is fortunate that in a case of such far-reaching importance, involving fundamental propositions of international law, both our Executive and our courts have passed upon the question after most mature consideration and have reached similar conclusions embodied in definite, authoritative decisions.

FREDERIC R. COUDERT.

RIGHT OF THE MASTER AND CREW OF A CAPTURED SHIP TO EFFECT HER RESCUE

A MERCHANT ship captured in war by a cruiser is commonly put in the hands of a prize crew and, often with her own master and crew aboard, directed to proceed to the nearest port of the captor available for adjudication as to prize or no prize.

The cases in which the original master and crew have, during such transit, risen against the prize crew and, by force or fraud or both regained control of the ship are fairly numerous. It is proposed to examine the legality of such a course, and the rights derived therefrom; also the rights in the premises of the belligerent whose possession is displaced.

Bouvier lays down the rule that "Rescue differs from recapture. The rescuers do not by the rescue become owners of the property, as if it had been a new prize, but the property is restored to the original owners by the right of *post liminium*." ¹

In the first place, it must be observed, that on the capture of a neutral vessel no title whatever is divested and none passes to the captor, until adjudication. In the meantime possession got by force may be kept by force and likewise may be displaced by force. If it is so displaced by the original master and crew, it is not a recapture but a rescue, and the original title is merely freed from the forcible possession of the enemy and exists unencumbered as before capture. As soon as the ship reaches a port in her own sovereignty, liability to any penalty for such rescue ceases, and if captured on a subsequent voyage, she cannot be condemned for the former transaction. The lien of the captor, as it were, is destroyed when possession ceases. No adjudication is necessary to restore the title of the original owner, which has never ceased to exist. It was encumbered by the enemy's possession; that being ended, the title resumes its freedom and exists as before capture.

¹ *Bouvier's Law Dictionary*, title, "Rescue in Maritime Law."

The act of the master and crew in rescuing their ship is not one covered by their contract of service. It is beyond such agreed labors and responsibilities. A mariner is bound to aid in saving his ship from marine disaster and, therefore, he has no salvage for such service, which is fully rewarded by his wage. On the other hand, the rescue, being beyond his employment, is held good ground for salvage. Since neither salvage nor other reward is given by a court of justice for immoral or unlawful acts, such awards of salvage are the highest evidence that such rescues are, so far at least as the law of the court awarding the salvage is concerned, neither immoral nor unlawful acts. They have been frequently termed, in the opinion of eminent judges — "highly meritorious acts."

On a claim for salvage against an American ship taken by the French while bound from Philadelphia to London and rescued by her crew, the English court took jurisdiction because certain of the rescuing crew were British subjects and claimed salvage. Sir W. Scott (p. 277) says:

For although it is meritorious to rescue by force of arms from an enemy, it is quite the reverse to rescue from a neutral, from whom the owner would have a right to claim costs and damages for an unjust seizure and detention. If instead of this a rescue by force is attempted, and the party takes the law into his own hands, it becomes a breach of the law of nations, which would endanger the ship and cargo if that attempt should be disappointed.

He holds the French enemies to America and then holds that every person assisting in rescue has a lien on the thing saved. He holds the acts of the master and crew as to the rescue were

no part of their general duty as seamen; they were not bound by their general duty as mariners to attempt a rescue; nor would they have been guilty of a desertion of their duty, in that capacity, if they had declined it. It is a meritorious act to join in such attempts; and if there are persons who entertain any doubts whether it ought to be so regarded I desire not to be considered as one of the persons who entertain any such doubts. But it is an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship in discharge of any official duty, either ordinary or extraordinary.²

² The *Two Friends*, McDougal master, 1 C. Robinson, 271.

Two years later, in 1801, the same eminent judge decided the celebrated case of *The Beaver*, Conner master.³ This was a case of a British merchant ship taken with a cargo of wine, in sight of the English coast, by a French privateer, when all the crew, except the master and one boy, had been taken out. The master, seeing an opportunity, rose upon five Frenchmen that had been put on board and by knocking down the prize master and possessing himself of his pistols, the only fire arms on board, succeeded in driving the rest of the crew down below, and gained possession of the vessel. After steering some time toward the English coast, the ship was nearly lost in a storm. The master got twelve men from a British frigate, which came in sight, and kept possession. Finally, thinking the ship must be lost, all returned to the frigate. Later, the storm abating, the master returned to his ship and, with the help of a boat crew from the frigate, brought her to port. Sir W. Scott held this "a case of very peculiar merit on the part of the original salvors, the master and the boy, by whose distinguished gallantry the property was rescued out of the hands of the enemy." He says further of the master: "He is the person whose service must stand highest in the estimation of the court; and I do not recollect to have seen any case of salvage in which personal merit of that species presented itself more strongly for encouragement and reward. On this part of the case I shall decree at least the usual salvage of a sixth."

He held the King's ship bound to give assistance as well against the elements as against the enemy. Further he said: "The value of the property saved is about £6239, — I shall give a sixth of that sum, or £1000 to the master and boy, in this proportion, £850 to the master and £150 to the boy; who, I observe, is described as his apprentice and rather above the condition of a common seaboy without articles." He allows half as much only to the King's ship and put the costs on the owners. The reward to the courageous master and the sturdy boy must gratify every reader, even yet, after one hundred and sixteen years have passed.

This was a case where the tribunal was that of one of the belligerents and the ship rescued was of that nation, therefore of belligerent ownership.

³ 3 C. Robinson, 292; Scott's Cases Intern. L. p. 653.

The attorney general of the United States held a very similar doctrine, as we shall see, as to an American ship, which was neutral, but which was captured for breach of the pacific blockade of Mexican ports, and, before adjudication, rescued by her master. His conclusions, however, are based on the lack of power or duty on the part of neutrals to enforce belligerent rights which have not yet been consummated so as to change the title. The case was as follows:

The vessel, *Loue*,⁴ Captain Clark, had entered the port of Matamoras and sailed thence for New Orleans, its port of final destination. On this homeward voyage the ship was captured by a French ship of a squadron blockading the port of Matamoras. Some days after capture, but before condemnation, Captain Clark rescued his ship and brought her safely to New Orleans. The French Government demanded that she be surrendered to it on account of breach of blockade and such rescue.

The Attorney General held that if it were admitted that a breach of blockade had occurred and a rescue, each of which was good cause for condemnation, "still it is a principle equally well established and recognized that the offense thus incurred never travels on with the vessel further than the end of the return voyage. If captured or recaptured in any part of that voyage, she is taken *in delicto*, and liable to be condemned; but if she terminates the entire voyage in safety, that liability has entirely ceased; nor can the captors demand her condemnation, much less her delivery to them." Also that by international law "capture transfers no property in the vessel and cargo to the captors" till condemnation. Therefore, whatever may be thought of the conduct of Captain Clark in entering the port of Matamoras and the subsequent rescue, the captors have no rights of property in the vessel and have lost all right to cause her to be condemned.

The opinion holds that by well settled principles of international law "it is made the duty of the captors to place an adequate force upon the captured vessel; and if from a mistaken reliance on the sufficiency of their force, or misplaced confidence, they fail to do so, the omission is at their own peril. No instance is known in which it has been regarded as a ground for asking such interposition as is now sought."

⁴ See "Breach of Blockade Capture Rescue," opinion of Hon. Felix Grundy, Attorney General, Oct. 11, 1838, 3 Opinions Atty. Genl. 377.

The blockade in question was a "peaceful blockade" but, in the absence of precedents as to such blockade, the Attorney General based his opinion on the principles applicable "to ordinary blockades in time of war." Further the Attorney General held that the executive could not order such property of an American subject in the possession of the owner surrendered to a foreign government; that if there were any remedy open to the captor it was by judicial and not executive action.

The master and crew, it seems, are under no obligation to assist the prize crew in navigating the ship and if they refuse to assist and the prize crew, being inadequate, leave to the original master and crew the control of the ship and the latter turn her towards her own port, no penalty seems to attach. Thus in *The Pennsylvania*, M. Pherson, Master,⁵ an American merchant ship from Trieste to Canton was captured by two British cruisers in the Mediterranean and three persons put on board. They were unable to navigate the ship, and the captain continued to direct her course according to the direction of the owners, refusing to carry her into Malta for adjudication, as required by the prize master. Just after passing Malta she was boarded by a third privateer and taken into Malta and condemned as having been rescued from the original captain.

Sir W. Grant held, as to the duty of the master and crew to navigate the ship to such port as the prize master directs at the peril of confiscation:

We cannot see that any such duty is imposed on the master and crew. They owe no service to the captors and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it from any anxiety to make other captures or thinking the force already furnished sufficient, it is exclusively at their own peril. In this case the captain performs a duty he conceives he owes to the owners. He will not act against their interest, nor will he attempt to prosecute their interest by any violence on his part or that of his crew. Neither he nor they are bound to make resistance. The captors, therefore, are left to pursue their separate interests; they are unable to navigate the vessel and the captain resumes his command.

The decree of condemnation was reversed and the vessel was ordered restored.

⁵ Acton's Report, Vol. 1, p. 34, High Court of Appeals, 1809.

A somewhat famous case of rescue arose during our Civil War, involving a British ship, *The Emily St. Pierre*.⁶ She was captured by a United States ship of war March 18, 1862. She was on a voyage from Calcutta with orders to make the coast of South Carolina and ascertain whether or not it was still blockaded. If so, she was to go to New Brunswick, if not to Charleston. She was taken on the high seas, ten or twelve miles from shore, heading for Charleston. All her crew were taken out except the master, cook and steward, who were kept on board to testify before the prize court. A prize crew of two officers and thirteen men were put aboard and ordered to take her to Philadelphia. On the way the three prisoners rose against their captors, secured and disarmed them, gagged and put them in irons. After a voyage of thirty days through rough weather they brought the ship to Liverpool.

Mr. Adams, the minister of the United States, demanded of the British Government restitution of the ship. He denounced the rescue as fraudulent and an outrageous act, and he cited the decision of Lord Stowell in the *Catherine Elizabeth*⁷ that such rescue, by a neutral master, violates the duty imposed on him by the law of nations. The British Government replied that it had no power to take the vessel out of the possession of her owner, whose rights had never been extinguished by the sentence of a prize court. That, if the rescue had failed, there was no doubt that the attempt would have rendered her liable to condemnation. That by international law only the belligerent could enforce belligerent rights and by the same law neutral nations were prohibited from enforcing them.

Professor Montague Bernard, to whom I owe the statement above,⁸ adds:

This correspondence came to a somewhat abrupt conclusion, partly due, as it appears, to a curious discovery made at the American Legation. It was found that a claim resembling that which the United States were making against Great Britain had, in the year 1800, been made by Great Britain against the United States, and that it had

⁶ *The Emily St. Pierre* (1864), Dana's *Wheaton*, 475 Note, *Scott's Cases*, p. 655.

⁷ *Rob. V.* p. 232.

⁸ See *An Historical Account of the Neutrality of Great Britain during the American Civil War*, pp. 325 - 329.

been refused on the very grounds, which when urged by Lord Russell; had proved so unsatisfactory to Mr. Adams. (See p. 328.)

Professor Bernard, in a note quotes the reply of Mr. Pickering, Secretary of State, of the United States, in the cases of the brigantine *Experience*, Heurt, Master; the ship, *Lucy*, James Conolly, Master, and the brigantine *Fair Columbia*, Edward Cary, Master, rescued from British captors by their masters, which refers the British Government to the American "tribunals of justice, which are open to hear the captors complaints," but holds "no precedent is recollected, nor does any reason occur, which should require the neutral to exert its power in aid of the right of the belligerent nation in such captures and detentions."

The crew of a captured merchant vessel is not ordinarily to be held as prisoners of war. The status of neutrals engaged in running the blockade of our Southern coast during our late Civil War, after some errors and just complaints, was settled July 25, 1863, by a note of President Lincoln to the Secretary of the Navy, as follows:

You will not in any case detain the crew of a captured neutral vessel, or any other subject of a neutral Power on board such vessel, as prisoners of war or otherwise, except the small number necessary as witnesses in the prize court.

Note: The practice here forbidden is also charged to exist, which if true, is disapproved and must cease.

The President added:

What I propose is in strict accordance with international law, while if it do no other good, it will contribute to sustain a considerable portion of the present British Ministry in their places, who, if displaced, are sure to be replaced by others more unfavorable to us.⁹

It should be remarked, *en passant*, that Mr. Lincoln, with all his great qualities, was profoundly unacquainted with international law, and depended for direction upon his Secretary of State, Mr. Seward. The latter, with all his small qualities, was equally uninformed on this topic and constantly neglected to seek information from the books. Mr. Lincoln's Secretary of the Navy, Mr. Welles, took far greater

⁹ See article by this writer, *Yale Law Review*, Dec. 1904, p. 84.

pains to investigate questions arising in international law, and complained constantly of the errors of the Department of State.

Instructions in full accord with Mr. Lincoln's directions were issued by the Secretary of the Navy May 16, 1864, and *bona fide* neutrals on neutral ships captured were held exempt from treatment as prisoners of war and entitled to immediate release.¹⁰

The instructions issued in 1898 by our Secretary of the Navy in the Spanish War when the Cuban coast was blockaded, which instructions were prepared by our Department of State, are to like effect and declare: "The crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration."

The practice in the Russo-Japanese War at Port Arthur, was the same, as I was assured by letter from the United States Consul at Yokohama, dated July 27, 1904, though this was rather a siege than a blockade. The Japanese Embassy, however, advises me that the practice was like our own as to the crews of neutral ships captured while carrying contraband, and Russia adopted the same rule.

The neutral crew of a neutral ship being brought in for condemnation as a prize, cannot, therefore, be held to be prisoners of war in all respects. Their situation, however, is, until they can be released, somewhat analogous, only more favorable; therefore, we may with profit inquire what treatment by way of repression, or punishment for escape, or its attempt, prisoners of war may be lawfully subjected to.

By the Brussels Declaration, "escaped prisoners who are retaken before being able to rejoin their own army, or before leaving the territory occupied by the army which captured them, are liable to disciplinary punishment."

"Prisoners, who after succeeding in escaping, are again taken prisoners, are not liable to punishment on account of their previous flight,"¹¹ but Professor Bordwell (p. 241) says:

The prisoner, however, is not justified in using violence in attempting to escape, and if he resorts to such methods, may be punished under the first paragraph of the article, according to the laws, regulations and orders in force in the army of the state into whose hands he has fallen.

¹⁰ Official Record U. S. & Confederate Navies, Series 1, Vol. 10, pp. 60-61.

¹¹ Bordwell's Law of War, p. 242.

The regulations adopted at The Hague, in 1899, as to the Laws of Land War are almost identical with those of the Brussels Declaration; thus, Art. VIII:

Prisoners of war shall be subject to the laws, regulations and orders in force in the army of the State into whose hands they have fallen.

Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

Escaped prisoners, recaptured before they have succeeded in regaining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

Prisoners, who, after succeeding in escaping are again taken prisoner, are not liable to any punishment for the previous flight.¹²

Our own Instructions to Armies in the Field provide as follows:

A prisoner of war who escapes, may be shot or otherwise killed in his flight, but neither death nor other punishment should be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime.

Woolsey¹³ says:

Persons escaping from captivity, and retaken, or even recaptured in war, are not held to merit punishment, for they only obey their love of liberty.

The late General George B. Davis,¹⁴ Judge Advocate General of the United States Army, observes:

A prisoner of war in attempting to escape, does not commit a crime. It is his duty to escape if a favorable opportunity presents itself. It is equally the duty of his captor to prevent his escape, and he is justified in resorting to any measures, not punitive in character, that will best secure that end. A prisoner of war may be killed in attempting to escape. If recaptured his confinement may be made more rigorous than before.

This is also quoted by Rear Admiral Stockton, with apparent approval.¹⁵

Our own "Instructions for the Government of Armies of the United States in the Field" (Sub. 59) provide:

¹² See 2 Westlake's International Law, p. 64.

¹³ International Law, p. 216.

¹⁴ See Davis' Elements of Int. Law, 3d ed. p. 315.

¹⁵ Stockton's Outlines of International Law, p. 320.

A prisoner of war remains answerable for his crimes committed against the captors, army or people, committed before he was captured, and for which he has not been punished by his own authorities.

This, however, does not seem applicable to offenses after capture.

The Convention Relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, adopted at The Hague in 1907, by Articles 5 and 6 clearly indicates that the officers and crew of an enemy ship, if of belligerent nationality, are made prisoners of war, if not paroled, but this does not apply to the crews of neutral vessels.

The provisions of The Hague Convention as to disciplinary punishment of prisoners attempting escape are not understood to include death; but plots, rebellion, or riot, would bring a prisoner under the former part of the article and the penalty of death might be incurred in them.¹⁶

Professor Takahashi says:¹⁷

It is a question whether sailors of merchantmen may be prisoners or not. . . . Conforming to the opinion of many publicists, there is no objection theoretically for treating sailors of merchantmen as prisoners, and practices agree in several cases.

He says further:

During the Russo-Japanese War, Japan was more liberal than Russia. Only crews of merchantmen, who formerly served in the navy, were treated as prisoners, and others were released. On the 21st of February 1904, the Japanese Minister of the navy gave instructions to the commander of the Sasebo naval stations that when Russian vessels were confiscated as rightful prizes at the prize court, their masters and crews may be released on parole not to serve again during the same war, and they may be given passage from Nagasaki to Shanghai if they want it, in all cases except contraband persons and those whom it was considered necessary to intern.

The Minister issued rules of practice in such cases which are given, with a list of eight Russian ships captured and of 414 of their crews released.

¹⁶ 2 Westlake's International Law, 64; Bordwell's Law of War, 241-2; Hershey's Essentials of International Law, p. 376.

¹⁷ International Law Applied to Russo-Japanese War, p. 138.

Professor Takahashi says further:

Japan captured Russian merchantmen, but did not destroy a single vessel. Contrary to this, Russians sank all Japanese merchantmen they saw, and few were captured. The crews on board of vessels they sank were treated as prisoners of war.

He gives a list of six such vessels so treated. This was the last naval war before the Hague Conference of 1907.

At page 131 Professor Takahashi also gives a table showing offenses and punishment of the Russian prisoners of war. There were 126 attempts to escape by army officers and 78 by naval officers. Of these 188 were punished by confinement to barracks, others by imprisonment, open arrest or reprimand; none by death or other penalty than as above.

It is almost impossible as yet to consult or collate the rulings in the present war, information being so largely unpublished and withheld. One English case may be cited, however.

In April, 1915, Lieutenant Andler of the German Navy was placed on trial at Chester, England, for attempt to escape from the internment camp. Captain Andler and Lieutenant Leben, after escaping from the camp where they were interned, wandered a week in the Welsh hills, but were finally recognized and captured.

Andler was placed on trial before a court of five English officers, and pleaded guilty. When asked if he wished to make any statements in mitigation of punishment he said that, according to the Hague Convention, he was only subject to disciplinary punishment. He seems to have claimed that the convention made a difference between disciplinary punishment and other punishment, "that it provided for escaped prisoners of war who were retaken merely such disciplinary punishment," but on the other hand that paroled prisoners recaptured, bearing arms against the government which had released them, forfeited their right to be treated as prisoners of war and might be put on trial before the courts.

After some controversy and after he had been advised that any punishment imposed by the court would require confirmation by the general commanding the district, he still insisted that disciplinary punishment can only be inflicted by one individual, and formally

protested against being tried by the court. He said he could be tried only by his commandant or the immediate superior of the commandant.

The court, apparently after consideration, overruled his objections. It considered its sentence in private.¹⁸

A young American officer of the French Army at home on a brief furlough, informs the writer that certain French aviators escaped from custody as prisoners of war in Germany by shooting two sentinels. The French authorities employ them elsewhere than at the front, fearing that, if again captured by the Germans, they might be put to death.

The conclusion is reached that the master and crew of a captured vessel, in attempting the rescue of their ship and cargo, are guilty of no crime so far as the laws of their own country are concerned, or so far as any law of any neutral country is concerned; that the attempt, however, may be resisted, even to the death by the captors; that, not accompanied by violence, no serious penalty attaches, further than closer confinement; but if accompanied by violence, punishment may be inflicted by the captor according to his laws and regulations, if the prisoner does not escape beyond his jurisdiction.

CHARLES NOBLE GREGORY.

¹⁸ *London Times*, April 24, 1915, quoted Stowell & Munro's *International Cases, War and Neutrality*, p. 207.

THE HELLENIC CRISIS FROM THE POINT OF VIEW OF CONSTITUTIONAL AND INTERNATIONAL LAW¹

PART II

THE summary review in the previous article of the historical events which culminated in the creation of the Hellenic Kingdom, and the vicissitudes which Greece underwent from the time of the declaration of her independence up to the year 1911, when her Constitution of 1864 was revised, plainly show that the Hellenic people never for a moment thought of submitting themselves to autocracy, but on the contrary asserted their determination to live under a democracy. Hence the murder of their first president, or governor Capodistrias, the deposition of their first king, Otho, and the abjuration now by a large section of the Hellenic nation both in and out of Greece, of their present ruler, Constantine, who, under the cloak of the Constitution, rules the part of the country still under his dominion, not as a constitutional King of the Hellenes, but as an absolute monarch.

King Constantine, in answer to his critics, who upbraid him for the manner in which he wields his royal power, asserts that in exercising his prerogatives he adheres strictly to the letter of the Constitution and repudiates the charge of unconstitutionality for any of his actions. It should be recalled that the sovereign of Greece claims the exclusive right of conducting the foreign affairs of the country,² leaving its internal administration to the care of the "servants of the Crown," namely, his Ministers, and he contends that in case the latter refuse to carry out the "royal policy" he has the right to dispense with their services, it being immaterial whether such "servants of the Crown" enjoy or not the confidence of the duly elected representatives of the nation.

Furthermore, the King of the Hellenes asserts that, in order to carry out his policy, he has the right to exercise the prerogative con-

¹ Continued from the January, 1917, number, p. 46.

² See this JOURNAL for January, 1917, p. 70, note 56.

ferred on the Crown by the Constitution (Art. 37), namely, to dissolve the Boulé (the legislature) and order new elections; and that, if the people by their votes again give a majority to the political party to which such ministers are affiliated, thereby indorsing the policy of the latter and disapproving that of the King espoused by another group of politicians, the King still claims that he is not under any obligation to bow to the national will, but that he can again and again dissolve the Legislature until he can secure a body that is willing to support a cabinet which will carry out the will of the monarch. In short, King Constantine arrogates to himself the right of shaping the destinies of the nation, of declaring war or remaining at peace, without any interference whatever from the people or their representatives.

Such being the contention of the King of the Hellenes, it is pertinent to inquire whether the attitude taken by him from the time of the declaration of the present European War up to the present time, with the consequent "royal actions," can be justified according to the Constitution of Greece, which, on his accession to the throne, he undertook under oath faithfully to maintain.

The bone of contention, so to speak, between King Constantine on the one hand, and Mr. Venizelos and the nation generally on the other, is the difference in their interpretation of the royal prerogatives embodied in the Constitution. The view of the Greek sovereign is that the letter of the instrument does not need any construction and that all rights therein conferred on the Crown are to be taken literally; while the contention of the Cretan statesman and his party is that the provisions of the Constitution must be construed in accordance with the existing constitutional usages in Greece, and also those in force in other countries enjoying constitutional government, which may be summarized in the expression or dictum that "the Prince reigns but does not govern."

Limiting ourselves to the actual controversy between ruler and premier, we see that the latter contends that, after the general elections of June, 1915, the King should have abided by the national will; that the dissolution of the Boulé in the course of the year 1915 was decreed by him (the King) because his Majesty had disagreed with the policy of Mr. Venizelos and his party, who advocated the participation of Greece in the European War on the side of the Triple, now Quadruple,

Entente; and that the people by their votes given in said elections, indorsed the policy of Mr. Venizelos.

It should be noted that both before and during the electioneering campaign of March-June, 1915, the divergence of views between the King and Mr. Venizelos was an open secret, it being hotly discussed both in the press and in the speeches to the constituents. It was also the catchword of the politicians who supported the King's policy by warning the voters that if they voted for the Venizelos candidates Greece would enter the European War, but that if they cast their votes for the "party of the King," they would be spared that ordeal and continue to follow their peaceful vocations. The result of these elections, notwithstanding the royal support, was a complete victory for Mr. Venizelos and a humiliating defeat for Constantine. Hence the subsequent high-handed proceedings of the sovereign in again dissolving the Legislature in order to impose upon the nation his own personal policy, namely, a so-called "benevolent neutrality" towards the Allies in appearance, but in fact, as it has been now attested, to give secret help to the Central Powers and particularly to Prussia, the fatherland of the Queen of the Hellenes.³ Hence the irreconcilable divergence of views between the soldier sovereign and the jurist statesman, the one asserting the right to use the royal prerogative as the letter of the Constitution prescribes, the other contending that both tradition and universal practice militates against such exercise.⁴ Hence the chasm created between a sovereign imbued with the idea of the divine right of kings, and the citizen nurtured in the modern school of democracy repudiating indignantly such obsolete notions of government. Hence the abandonment of King Constantine and his adherents to their fate

³ Proofs for this assertion will be adduced in a subsequent article.

⁴ After the constitutional régime inaugurated in France by the Charter of 1814, a controversy arose between the two political parties of the time, namely, the Royalists and the Liberals, the former contending that the Charter should be applied literally, the latter on the contrary asserting that it should be carried out according to its spirit. It was then that Thiers laid down the principle that the King reigns but does not govern. See on this point the learned treatise of Professor J. Barthélémy entitled *l'Introduction du Régime Parlementaire en France* (1914), p. 78. Barthélémy, however, tells us that the majority of the writers indorse the other maxim, — which does not differ much in substance from the former — that "the King does not govern; but he influences the government." *Ibid.* p. 80.

in old Greece, to suffer repeated humiliations, to face starvation, to submit to the invasion of the territory of Hellas by friends and foes alike, and the establishment of a new government by the elite of the nation in New Hellas, in order to save the national honor and preserve the territorial integrity of the Kingdom with the possibility, be it remote, of gathering under the ægis of the Hellenic state some of the remnants of Hellenism still under a foreign yoke or dominion.

In order to understand the controversy it is necessary to refer to the parliamentary systems of some of the European states, from which Greece borrowed her Constitution, and particularly to that of England, which has undoubtedly been the prototype of all modern constitutional governments.⁵ A French writer states that the English Constitution was appealed to by all the oppressed nations and acclaimed in every revolution, that every state that was formed during the course of the nineteenth century copied it more or less faithfully, and that Belgium adopted it in 1830.⁶ A contemporary English writer says that Italy and Belgium (from which last country Greece borrowed her Constitution), with some variations, "remodeled their Constitutions in the last century with the express object of assimilating them to the English."⁷

To revert to our subject, the crux of the controversy between King Constantine on the one hand, and Venizelos and the Greek nation on the other, is the construction or misconstruction of the provisions of the constitutional charter. The King ignores entirely the parliamentary customs and usages, known in England as the understandings or con-

⁵ E. Freeman, *The Growth of the English Constitution* (1898), pp. 18-19; Bryce, *Studies in the History of Jurisprudence*, p. 125; Gladstone, *Gleanings of Past Years* (1879), Vol. I, p. 228; Sir Henry Maine, *Popular Government* (1897), pp. 9-14; Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 1-7; Hearn, *The Government of England* (1867), p. 2; Guizot, *Histoire des Origines du Gouvernement Représentatif en Europe* (1851), *première leçon*, p. 11; E. Boutmy, *Studies in Constitutional Law*, tr. by E. M. Dicey (1891), p. 3; Glasson, *Histoire du droit et des Institutions politiques, civiles et judiciaires de l'Angleterre*, Vol. VI, p. 8; A. Esmein, *Éléments de droit Constitutionnel Français et comparé* (1906), pp. 45 *et seq.*; Duguit, *Traité de droit Constitutionnel*, Vol. I, pp. 411, 421-422.

⁶ P. Matter, *La dissolution des Assemblées Parlementaires*, pp. 217-218; see also Jellinek, *Allgemeine Staatslehre* (1914) p. 704.

⁷ Sidney Low, *Governance of England* (1904), pp. 44-47.

ventions of the Constitution, namely, the political ethics by which a constitutional chief of state should be guided in the exercise of the discretionary powers conferred on him by the Constitution. In England, where parliamentary government is undoubtedly far more advanced than in any other country, these precepts and usages are now more religiously guarded than was the case in former times, having by successive national awakenings and revolutions been firmly and solidly riveted into the English body politic.

As a matter of fact, such constitutional customs or maxims exist in every country endowed with a constitution, be that a kingdom or a republic. If a sovereign of a constitutional state, whose Constitution is unwritten or flexible, written or rigid, to use the words of Lord Bryce, would, in the first instance, use his prerogative without any restraint whatever, and in the second, adhere strictly to the letter of the Constitution, he would undoubtedly become an absolute monarch. Nor is the case different with a republic, where the literal exercise of the powers conferred on a President by the Constitution would make him practically a dictator. By the charters of every constitutional country large powers are granted to the chief of state, the founders or framers of the Constitution thinking, rightly or wrongly, that such exalted personages would use these prerogatives with discretion, and that in the exercise of their power they would be guided solely by the spirit and not adhere strictly to the letter of the Constitution.

Freeman in his excellent work on the growth of the English Constitution, commenting upon the customs and usages above referred to, tells us that in England alongside the Royal charters or Acts of Parliament . . . "there has grown up a whole code of political maxims universally acknowledged in theory, universally carried in practice . . . but which are hardly held less sacred than any principle embodied in the Great Charter or in the Petition of Rights." "In short," he adds, "by the side of our written law there has grown up an unwritten or Conventional Constitution." According to the learned English historian, to overlook these maxims would not be a violation of the written law, but if a Minister continues to hold an office notwithstanding the disapproval of his policy by parliament he "would be universally held to have trampled underfoot one of the most undoubted principles

of the unwritten but universally accepted Constitution." In conclusion, he says, "the unwritten Constitution makes it practically impossible for the Sovereign to keep a Minister in office of whom the House of Commons does not approve, and it makes it almost equally impossible to remove from office a Minister of whom the House of Commons does approve."⁸

Professor Dicey, in his masterly exposition of the English Constitution, deals at length with these usages and customs, which are called by him "Conventions of the Constitution," a name since adopted by various authors. He summarizes the examples of Constitutional understandings or Conventions of the Constitution given by Freeman, and says: "A Cabinet, when outvoted on any vital question, may appeal *once* [the italics are ours] to the country by means of a dissolution. . . . If an appeal to the electors goes against the Ministers they are bound to retire from office, and have no right to dissolve Parliament a second time." All these rules, he says, or most of them, are for the purpose of determining "the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised." Referring to the ultimate object of the constitutional precepts, Dicey says that "their end is to secure that Parliament or the Cabinet, which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State — the majority of the electors, or (to use popular though not quite accurate language) the nation. . . . The electorate is in fact the Sovereign of England." In conclusion, he says that "our modern code of Constitutional morality secures, though in a roundabout way, what is called abroad the Sovereignty of the people."⁹

Sir William Anson, commenting upon the duty of Ministers to retire from office if they are defeated on a vital question, or to ask the King to dissolve Parliament, if they have reason to believe that the House of Commons does not represent the feelings of the country,

⁸ Freeman, *ibid.*, pp. 112-119. The same views are expressed in his *Historical Essays* (1892), Fourth Series, pp. 483-484.

⁹ Dicey, *Introduction to the Study of the Law of the Constitution* (1915), pp. 416-418, 422-426.

says, "Ministers are not only the servants of the King, they represent the public opinion" and therefore, "the King, as represented by his Ministers, must, by the conventions of the Constitution, work in harmony with public opinion as represented by the members of the House of Commons."¹⁰

The existence of these constitutional customs in every country endowed with a liberal constitution, whether all its constitutional liberties are covered or not by the letter of the charter, is beyond discussion. They exist not only in states ruled by a sovereign but also in republics. The checkered political life of France and the struggles of its people for political freedom against the encroachments, from time to time, of their so-called constitutional sovereigns, proves their existence in that country.¹¹

Their existence even now in republican France is attested by her writers. Thus, the author whom Dicey mentions (p. 23, note 1) tells us that although according to the letter of the present Constitution of the French Republic, the President appoints all public functionaries, as a matter of fact the exercise of that power is left to the Ministers. Again, although the Constitution does not prohibit the President from dismissing the Ministers, still he does not actually exercise that right because the Chamber of Deputies is really the controlling factor

¹⁰ The Law and Custom of the Constitution (1911), p. 383.

Jellinek observes that Hatschek, the German author on the English Constitution (*Englisches Staatsrecht*, Vol. I, pp. 542 *et seq.*) has in a very suggestive way undertaken to show that part of these so-called conventions or rules are really legal maxims. "For us," adds Jellinek, "it is yet an open question how far these Constitutional or political ethics contain customary rights or legal maxims." (Jellinek, *Allgemeine Staatslehre* (1914), p. 703.)

A French writer on British political institutions, using rather allegorical language, says, "These usages, conventions or better understandings are the most invisible and most important elements of the Constitution. They do not create or destroy; they do not change the letter of the law, but they distort its spirit. They are born one day and suddenly disappear the next. One may think that they are dead, but they only slumber until the time when there is occasion to bring them to life." (Comte de Franqueville, *Le Gouvernement et le Parlement Britanniques*, Vol. I, 1887, p. 73.)

¹¹ A notable example of comparatively recent times is that of Charles X (King of France), who was compelled to abdicate because he transgressed the constitutional understandings.

in the matter, and the President can only dispense with the services of a Minister upon the proposal and with the consent of the Cabinet.¹² Other French constitutionalists indorse these views and, as Professor Duguit well observes, most of the powers conferred on the President of the French Republic are exercised by his Ministers, who in turn are under the control of Parliament.¹³ Other French authors also agree that the right given to the President by the Constitution "to dispose of the armed forces of the Republic" is now a mere "fiction" and "not in harmony with the present regime."¹⁴ In the words of Esmein, if "a President of the French Republic, being ignorant of military art, would claim the right conferred on him by the Constitution to actually command the army in time of war and thereby jeopardize the safety of the country, such an action would be considered high treason."¹⁵ The same observation applies to the President of the United States.

That such constitutional customs exist also in the United States, notwithstanding the rigidity of its Constitution, is quite evident to any student or observer of political institutions. Thus, Lord Bryce in his classical work on the Constitution of this country, after referring to the existence of constitutional conventions or understandings in England, which he considers as being "no less essential to the smooth working of the English Constitution," points out that they even exist in the United States where there is a written Constitution. "Some of the features," he says, "of American Government . . . rest neither upon the Constitution nor upon any statute, but upon usage alone." As an example, he mentions the fact that the Presidential electors have lost by usage the right "of exercising their discretion."¹⁶ "It is natural," says the same writer, "it is indeed essential that there should be in every country such a parasite growth of usages and conventions round the solid legal framework of government."¹⁷

¹² H. Chardon, *L'Administration de La France* (1906), pp. 86-93.

¹³ L. Duguit, *Traité de Droit Constitutionnel* (1911), Vol. II, p. 435. Also A. Esmein, *Éléments de Droit Constitutionnel Français et comparé* (1906).

¹⁴ Duguit, *ibid.*, II, p. 439; Chardon, *ibid.*, p. 94.

¹⁵ Esmein, *ibid.*, p. 604, note 8.

¹⁶ James Bryce, *The American Commonwealth*, Vol. I (1910), p. 383.

¹⁷ *Ibid.*, p. 386. See also on the same point, James Bryce, *Studies in History and Jurisprudence*, p. 124.

Professor Dicey observes that "the understanding that an elector is not really to elect has now become so firmly established, that for him to exercise his legal power of choice is considered as a breach of political honor too gross to be committed by the most unscrupulous of politicians." "The power of an elector to elect," he adds, "is as completely abolished by constitutional understandings in America as is the royal right of dissent from bills passed by both Houses of the same force in England."¹⁸ Distinguished American constitutionalists are not less emphatic in their assertions as to the existence of these conventions. Thus, the learned author of the *Government of England* says, "Customs or conventions of this kind exist, and in the nature of things must to some extent exist, under all governments. . . . The conventions do not abrogate or obliterate legal rights and privileges, but merely determine how they shall be exercised. . . . In the main they are observed because they are a code of honor."¹⁹ President Wilson, referring to this point, says, "It is at once curious and instructive to note how we have been forced into practically amending the Constitution without amending it. Our method of choosing Presidents is a notable illustration."²⁰

A Belgian author asserts that custom is considered in Belgium as one of the sources of public law. He says:

It is custom which distinguishes the institutions of one country from another when the texts are identical or similar. For instance, who could sound [the depth] of the political abyss separating the two Kingdoms (Prussia and Belgium) by the mere reading of the Belgian and Prussian Constitutions?

The conception even of Constitutional royalty and Parliamentary Government consists entirely of customs. It has been repeatedly said that the Parliamentary regime, unwritten in the country of its origin, has remained such in all the countries that have adopted it. It is sufficient to mention the rules of the political responsibility of the Ministers before the Chambers, which are not prescribed in any part of our Constitution. As we cannot conceive a Ministry selected by the King outside the Parliamentary majorities, so we cannot understand the maintenance in power of a cabinet when the majorities, have changed. The existence and the functions of a Prime Minister are not provided in the text (of the Constitution). It is also custom

¹⁸ Dicey, *ibid.*, p. 29; also Anson, I, *ibid.*, p. 7.

¹⁹ L. Lowell, *The Government of England*, Vol. I (1912), pp. 9, 10, 11, 12.

²⁰ Woodrow Wilson, *Congressional Government*, pp. 242-243.

that imposes upon the King the duty of dissolving the Chambers or one of them, in case of conflict between them or the Ministry. Lastly, the whole system of Cabinet Government in its essential forms and minutest features is the work of custom, born and developed according to the rules so well laid down by the historical school.^{20a}

Greek constitutionalists also admit the existence, in Greece, of such customs. According to a distinguished Greek jurist, the sources of constitutional law are the written text of the Constitution and the unwritten law which is formed in conformity with the spirit of the text and the national traditions. These customs, he says, which are gradually put in practice, constitute the parliamentary law "whenever they are founded on right reason and legal science."²¹

Professor Saripolos, of the University of Athens, in enumerating the privileges of the Greek Legislature, says:

The control of the government, which is regulated by the Constitution and developed by the conventions of the Constitution, refers to the responsibility of the Ministry to the Legislature. . . . The Legislature, or rather a committee, namely, the Ministry, which as a matter of fact is elected by it, has united in its hands politically the legislative and executive authority, and particularly the president of this committee, namely, the Prime Minister, who exercises really the prerogatives which as a matter of form belong to the King only or to the King and the Legislature. The latter has become the source and dispenser of authority, after having appropriated to itself the prerogatives which, according to the Constitution, belong to the King. This preponderance of the Legislature (over the King) is due to two causes: to the revolutionary source of the Constitution and the Dynasty, and also the lack of a Senate or second Chamber.

He further tells us that the Constituent Assembly which adopted the Constitution of 1864, in imitation of that of France of 1791, created only one chamber in order to have a strong body against the King, so that by its unity it could wield with force the sovereign will of the people, which it was thought would have been weakened by the existence of another legislative body.^{21a}

^{20a} Paul Errera, *Traité de droit Public Belge* (ed. 1909), pp. 5 and 208.

²¹ G. N. Philaretos, an article entitled "Form of Hellenic Government" in *Political and Parliamentary Monthly Review* (in the Greek language), ed. by G. Cafandaris, Book II, April, 1916, p. 140.

^{21a} N. N. Saripolos, *Das Staatsrecht des Königreichs Griechenland in Das Öffentliche Recht der Gegenwart*, Vol. VIII, pp. 47-48.

The conclusion to be drawn from the above exposition of the constitutional customs and usages prevalent in constitutional countries is that the provisions of the Constitution cannot always be applied literally, but are often enforced according to their traditional construction and modern parliamentary practice. A literal application of all the provisions of a Constitution would transform a constitutional king into a real autocrat, and the system of government would become entirely autocratic. The time has fortunately passed when a constitutional sovereign can with impunity either by subterfuge or force shake off the constitutional garb and, in the terse language of Sir Walter Raleigh, "Turk-like tread under his feet all the national and fundamental laws, principles and ancient laws of his people."²²

Having in a general way reviewed the constitutional customs or understandings which are, in every country, held as being not less binding than written provisions, let us now inquire into the particular contention of the King of the Hellenes that he has the absolute right to conduct the foreign affairs of the kingdom, irrespective of the views of his Ministers enjoying the confidence of the legislature; and that, in case of divergence of opinion between himself and his Ministers, he has the right to dismiss them, and to dissolve the legislature whenever the representatives of the nation support a Cabinet which does not shape the foreign policy according to the directions and will of the Crown.

The King, in an interview with the correspondent of the *Atlantis*, a Greek paper published in New York, in February, 1916, said: "When I dissolved the Boulé, I acted according to the Constitution, and if I dissolve it again, I shall always be acting according to the Constitution . . . which I took an oath to maintain first amongst the Greeks."²³ Another utterance of King Constantine made to the editor of the *Esperine*, of Athens, indicates his conception of the rights of a constitutional sovereign. "I will remain," he said, "steadfastly to my present policy as long as I think that the war is not in the interest of Greece. I shall not bend, in order to throw the country in the war, as long as I am not convinced by the events (of the war) that it is in the interest of Greece to enter the war. I shall persist in this stand (which

²² Quoted by Hallam, *The Constitutional History of England* (1897), Vol. I, p. 275.

²³ *Atlantis* of May 16, 1916; also *Keryx* (of Athens, May 13, 1916).

I take) no matter what happens within the circle of events upon which my supposition is based in regard to the policy to be followed."²⁴

But during the recent attack of the Greek troops (December 1, 1916) against the international contingents at Athens, the King told the Ministers of the Allies, who remonstrated with him for not having kept his promise, that "he was not an Emperor of China but a Constitutional King." When the Ministers reminded him of his former statements to them and to others that all his commands and orders were executed, "Oh," said Constantine, "times were different then. It is not so at present."²⁵ The King quite recently, in another interview given to the correspondent of the Associated Press, admitted that he was only a soldier and did not understand politics.

Such being the stand taken by King Constantine, it becomes necessary to see what is the practice in other constitutional kingdoms, both in regard to the conduct of the foreign affairs of the country and to the right of a sovereign to dismiss the Ministers and dissolve Parliament.

The fundamental and basic rule in every Kingdom endowed with a liberal Constitution is that "the King reigns but does not govern." This principle is now so engrafted in every free country that to depart from it in the slightest degree would be considered as a wanton violation of the liberties of the people and an infringement of national sovereignty. It is from this maxim that flow all the limitations upon royal power and upon the faithful observance of it depends the maintenance of popular government. A corollary to this maxim is the irresponsibility of the Sovereign and the responsibility of the Ministers.²⁶

If we look for guidance to England, where the sovereign *ab antiquo* has wielded a great influence in the shaping of the foreign policy of the country, we find that even there, notwithstanding the traditional reverence for the wisdom of the Crown, the final word on such questions is with the responsible Ministers and ultimately the Cabinet enjoying

²⁴ Quoted by *Atlantis* of May 12, 1916.

²⁵ From an interview given to Mr. John Bass of the *Chicago Daily News*, January 24, 1917, reprinted in the *Figaro* of January 26, 1917.

²⁶ "The doctrine," says Macaulay, "that the sovereign is not responsible is doubtless as old as any part of our Constitution. The doctrine that his Ministers are responsible is also of immemorial antiquity." (*History of England*, 1907. Vol. IV, p. 122.)

the confidence of Parliament, or better still with the House of Commons. To quote Freeman again, "in foreign as in domestic affairs, the wish of the two Houses of Parliament or (when they differ) of the House of Commons ought to be followed."²⁷ All writers agree that the Crown has the right to advise on public matters generally, and on foreign affairs in particular, but between advising and controlling there is a great difference. "It is essential to our liberties," says Lord Macaulay, "that the House of Commons should exercise a control over all the Departments of the Executive Administration."²⁸ A distinguished Parliamentarian says, "The influence of the Crown must not be permitted to obscure in any degree the responsibility of the Minister who ultimately tenders the advice upon which action is taken," such a Minister "possessing the confidence of the House of Commons which represents the will of the nation." "If," he adds, "on rare occasions of transcendent importance the Crown sets aside the will of the Minister, this step is defensible on the assumption that the Minister no longer represents the national will."²⁹ Another English constitutionalist summarizes the question by saying: "In every act of state the King is guided by the advice of his counsellors; and in their removal he is guided by the advice of his Parliament." "The fundamental principle of that policy," he adds, "is that the discretion of the Crown shall be exercised in conformity with the wishes of the nation."³⁰ "The Cabinet," says Dr. Lowell, "must carry out its own policy; and to that policy the Crown must submit. . . . The King may, of course, be able to persuade his Ministers to abandon a policy of which he does not approve, . . . but if he cannot persuade them, and, backed by a majority of Parliament, they insist upon their views, he must yield."³¹

Sheldon Amos, after repeating that Parliament retains in its hands

²⁷ Quoted by Dicey, *ibid.*, p. 417.

²⁸ Macaulay, *ibid.*, IV, p. 542.

²⁹ L. Courtney, *The Working of the Constitution* (1907), pp. 125, 126.

³⁰ William Hearn, *The Government of England* (1867), pp. 115, 149. See also Anson, *ibid.*, Vol. II (1891), p. 290, who indorses the view that foreign affairs are "subject always to the collective advice of the Cabinet. The same writer (Anson), referring to the right of the King to dismiss his Ministers, says, "They have, it is true, been summoned, and continue to hold office by the pleasure of the Crown, but it is to the majority of the House of Commons and not to the will of the Crown that they look to enable them to retain their power." (*Ibid.*, Vol. I, p. 43.)

³¹ A. L. Lowell, *The Government of England* (1912), Vol. I, p. 31.

the power of guiding, generally, the policy of the country, comments upon the results of a policy beyond the control of the nation, which is exactly the case in Greece, where the present King has usurped both the domestic administration and the guidance of the foreign affairs of the state. The following remarks of the distinguished English jurist, therefore, apply *mutatis mutandis* to the actual political controversy in Hellas:

When, behind the responsible Ministers, there is a subtle, undefined, and therefore unlimited influence, . . . when this influence is not of the mere formal consultative sort, . . . but . . . takes all the innumerable shapes of suggestions, . . . and the scarcely concealed show of farsighted political aims not coincident with the policy of the Cabinet, or of Parliament, or of the country, . . . there is a factor introduced for which no theory of the English Constitution in its present form can possibly find a place. It is, indeed, a factor which, so far as it operates, must to that extent be the very negation of the Constitution and steadily tend to its destruction.³²

An excellent critic of Sir T. E. May's *Constitutional History of England* (Vol. I), writing in 1862, says that "a King who personally assumes the direction of affairs, and requires his ostensible Ministers to be the mere agents of his will, may be an able ruler, but unless he has a corrupt and servile parliament to deal with, he takes a course which is sure to bring the most important members of our constitutional system in dangerous collision."³³ The Greek Constitution of 1864, following the Belgian Constitution, adopted the principle of national sovereignty.

As Article 25 of the Belgian, so Article 23 of the Greek Constitution laid down the rule that "all powers emanate from the nation."³⁴

According to a commentator on the Belgian Constitution, the meaning of Article 25 "is a declaration of independence, an assertion of the liberty of the country and of the fall of every other foreign authority in Belgium." It is a solemn act of taking possession of the sovereignty.³⁵ Another Belgian author in reviewing the original sources

³² Fifty Years of the English Constitution (1880), pp. 316, 317.

³³ The *Edinburgh Review* of January-April, 1862, Vol. CXV, p. 229.

³⁴ For the Belgian Constitution, See Dareste, *Constitutions Modernes*, Vol. I, p. 77 *et seq.*; for the Greek Constitution, See Diplomatic and Consular Guide of Greece (in Greek, 1911), pp. 2 *et seq.*

³⁵ Orban, *Le Droit Constitutionnel de la Belgique*, Vol. II, p. 277; see also J. J. Thonissen, *La Constitution Belge* (1879), pp. 109 *et seq.*

of Article 25 says that the report of the committee "on the powers of Government in Belgium," which was submitted at the time of the drafting of the Belgian Constitution, stated distinctly that it was guided by the French Constitution of 1791.²⁵ A Belgian professor of constitutional law asserts that the Constitution of Belgium "wrought a revolution in state constitutions on account of its democratic principles founded on the French Constitution of September 3, 1791 and also on that of the United States."²⁶ As the Constitution of Greece is in its main lines a reproduction of the Belgian Constitution which, in its turn, derived its sources from the principles of the French Revolution and the French Constitution of 1789, it is evident that the sovereigns of Belgium and Greece are in fact rulers of "royal democracies" and cannot therefore arrogate to themselves more rights than the English sovereign, nor can they assume prerogatives like the King of Prussia.

Orban, after explaining the differences between absolute, limited and constitutional royalties, refutes the theory of certain writers, especially German, that the Executive may overstep the limits prescribed by the Constitution on the so-called "right of extreme necessity." "No jurist in Belgium," he says, "will ever recognize such a right, because it is contrary to the express provisions of the Constitution." This observation applies naturally also to the Greek Constitution.²⁷ In short, neither the King of the Belgians nor the King of the Hellenes has the right to direct the foreign affairs of their respective countries, and they are both bound to be guided and advised in all matters of internal administration or foreign policy by their Ministers enjoying the confidence of Parliament.²⁸

²⁵ Giron, *Le Droit Public de la Belgique* (1884), p. 94.

²⁶ Vautier, *Das Staatsrecht des Königreichs Belgien* (1892), in Marguadsen's *Handbuch des Öffentlichen Rechts*, Vierter Band, Erstes Half-Band, pp. 17, 19.

²⁷ Orban, *ibid.*, II, pp. 253-254.

²⁸ It may not be amiss to reproduce here a specimen of the conception of Prussian royalty. Professor Bornhak, comparing the Constitution of Belgium with that of Prussia, says that the former was the product of a revolution. Therefore, he says, by virtue of the principle of national sovereignty the Belgian Constitution delegated the various powers to the Chamber, the King and the courts; whilst, on the other hand, Prussia is the creature of the Dynasty, and [therefore] all rights of state power are united in the person of the sovereign. (Conrad Bornhak, *Preussische Staats und Rechts Geschichte* (1903), p. 466.)

A Greek jurist whom we have already mentioned, commenting upon the present constitutional anomalies in Greece, after tracing the origin of the Hellenic Constitution to the very days of the abortive Greek insurrection which broke out towards the end of the eighteenth century, when the then famous Greek leader and poet, Regas Pheraios, proclaimed the principle of the national sovereignty, tells us that the present Constitution of Greece is founded on the French Constitutional Charter of 1830 and on the Belgian Constitution of 1831, and adds that the committee which, at the time of the drafting of the Constitution of 1864, reported upon Article 44, according to which "the King has no other powers than those conferred expressly on him by the Constitution and the respective special laws," stated in its report that this article completes Art. 21, which declares "that all powers are derived from the nation."²⁹

Professor Saripolos, after telling us that the Greek Constitution, like that of France of September 3, 1817, has combined the principle of the sovereignty of the people with the institution of hereditary royalty, states: "If one considers not the law of the Constitution, but the conventions of the Constitution, one finds a kind of dictatorial republic, in which the exercise of all the power is concentrated in the hands of one person." "That person," he adds, "is not the hereditary King, but the Prime Minister." Comparing the Constitution of Greece of 1844 with that of 1864 (which is now in force), the same writer says: "The former was a limited monarchy, while the latter is a limited democracy, not only from the political, but also from the legal standpoint. . . . The nation is the fountain and source of all powers."³⁰

Another learned Greek constitutionalist, after asserting with no less emphasis that the doctrine of the sovereignty of the people was

²⁹ Philaretos, *ibid.*, pp. 135-137, 141. Philaretos gives us the further information that the late King George I (father of the present King of Greece), for whom he had acted, he says, as legal adviser, in a confidential talk with him expressed freely his views on the progress made in our age for political freedom. "The wisdom of ages," once said the King to Mr. Philaretos, "has definitely and irrevocably condemned the tyrannical and backward monarchism. Progressive humanity has settled in the royal democracy for a more complete political education. No one could now seriously contest that in the far future it will tend more generally towards democracy." (Philaretos, *ibid.*, p. 150, note 80.)

³⁰ Saripolos, *ibid.*, pp. 13-15, 19-20.

accepted in Greece during the War for Independence, it being repeatedly indorsed by the various national assemblies of the Revolution, states that "the Constitution of 1864 proclaims the people as the source of all authority in the state in imitation of the similar provision of the Belgian Constitution."^{39b} The principle that in Greece the government shall be conducted by the political party which enjoys the confidence of the Legislature was indorsed by the late King George I, the father of Constantine, in a speech from the throne in 1875 when, addressing the representatives of the nation, he said that "The indispensable qualification for a party leader to form a government is to enjoy the explicit confidence of the majority of the members of the Boulé," and that he would always recognize the privileges of the representatives of the nation which are founded both on the letter and the spirit of the constitution; further, that the King believed that "the moral and material progress of the country depended upon the sincere application of parliamentary government."^{39c}

The most distinguished constitutionalist of modern Greece, who is praised by Calvo for his treatise on international law (see Calvo, *Le Droit International*, Vol. I, p. 113), namely, the late N. J. Saripolos, father of the author of the same name, and who was the guiding spirit, so to speak, of the Constituent Assembly of 1862-1864, in reporting to the Assembly the findings of the committee of which he was the chairman, said: "In Greece there prevails the incontestable principle that the sovereignty belongs to the national entity only, and that all authority and power is derived from it."^{39d} Later, in his learned treatise on the Constitution of Greece, commenting upon this point, he wrote, "Our Constitution is nothing but a pyramid which has democracy as its base, and at the top of it a political chief called a King."^{39e} Similarly, another professor of constitutional law who was a member of the same Committee, D. Kyriacou, in his remarks to the National Assembly on this point said, amongst other things, that, as the doc-

^{39b} J. Aravantinos, *Hellenikon Sintagmatikon Dikaion* (i.e., Greek Constitutional law), Vol. I, pp. 177-78; see also, observations on same point, p. 203, note 10.

^{39c} Aravantinos, *ibid.*, p. 178, note 155; also Saripolos, *ibid.*, p. 82.

^{39d} Quoted by Aravantinos, *ibid.*, p. 203; note 10.

^{39e} N. J. Saripolos, *Pragmateia Sintagmatikou Dikaïou*, Vol. I, pp. 111 and 173; quoted by Aravantinos, *ibid.*, p. 217, note 8.

trine of the divine right never prevailed in Greece — the nation having always regulated its affairs by Constituent Assemblies — the formulation of the principle of the national sovereignty was a matter of course.³⁹

After the fall of the Venizelos Cabinet in March, 1915, King Constantine, in defiance of public opinion, assumed quasi-dictatorial powers and, in fact, became his own Minister for Foreign Affairs, and the Cretan statesman more than once took him to task publicly. Speaking in the Boulé, on October 11, 1915, Mr. Venizelos said:

The evolution which our affairs have taken in the last seven months, proves that we are outside the basis of our liberal parliamentary government; because, if the right of internal administration of the country is still recognized in the national sovereignty, as far as our foreign affairs and the shaping of the national policy are concerned, we are confronted with a disregard not only of the vote of the national representation, but also of the verdict of the Hellenic people given by the elections.⁴⁰

Speaking again on November 3, 1915, and commenting upon the interruption of a member of the Boulé who said "Then the King wishes the ruin of the Greek people," Mr. Venizelos replied: "You used a phrase which is unparliamentary in the highest degree. The King in a parliamentary government has no policy." Resuming his speech he continued:

If these men believe what they say; if they really claim that there can be in a parliamentary government a royal policy, except of a temporary nature for the purpose of appealing to the electorate in order that there may be a change in the government; if they believe there can be a positive and responsible royal policy, they show that they are unworthy of being representatives of the Hellenic people. . . . To govern the people in that way is not a regime of Constitutional royalty, or of a royal democracy under which we have lived for half a century, but a monarchical government in which the destinies of the country are intrusted to one man. . . . The Greek nation knows that the only form of government under which it can live and progress is a constitutional royalty, a royal democracy. If you tell me that your opinion is indorsed by an irresponsible ruler, I tell you that you commit a constitutional impropriety."⁴¹

³⁹ Quoted by Aravantinos, *ibid.* p. 203, note 10.

⁴⁰ Debates of Boulé in supplement of newspaper *Patris*, p. 47.

⁴¹ *Ibid.*, sup. *Patris*, pp. 71, 72 and 73.

The ex-Greek Premier repeatedly criticized the King for violating the Constitution. Speaking in Salonica on October 16, 1916, he said:

The people in Greece consider their King as the first magistrate of the state and that his functions do not consist in imposing his personal will, but in remaining night and day the faithful guardian of the national will, which should be carried out loyally and not falsified. Our Constitution both by its historical origin and by the very letter of its provisions, leaves no doubt as to the sovereignty of the people.⁴²

We have now reached the last point of the Greek controversy, namely, the question as to whether the King has the absolute right of dissolving the Greek legislature without any restraint whatever either from his Ministers or from the people at large.

Examining the question broadly, we may inquire whether a constitutional sovereign has the unlimited right of dissolving a body of national representatives, either because the prerogative of dissolution is conferred on the Crown by tradition or long usage, as is the case in England, or is bestowed upon the King by a special provision of the Constitution, as it is with all other constitutional countries. As this royal prerogative is also of English origin, British parliamentary history and the views of English statesmen and writers will furnish us a clue to the solution of the question.

Any student of English constitutional history knows that it took centuries for the people of England to embody into their unwritten Constitution the principle that, although in theory the Crown has the right to dissolve Parliament whenever it pleases so to do, still, in practice, it should only resort to that measure on the advice of the ministers, and further, that after one dissolution the sovereign or his cabinet should abide by the verdict of the country, given at the elections, independently of the personal views of the sovereign or his ministers.

Hearn, speaking of the harmony between the Legislature and the Executive, says:

In England this result is but of yesterday. It has been attained only after centuries of misunderstandings, of quarrelings and of bloodshed. One King lost his life, another his throne, a third was more than once on the point of abdication. . . . Even after three generations . . .

⁴² *Le Temps*, October 16, 1916.

the unyielding adherence of George the Third to his resolutions convulsed England to the center; dismembered the Empire.⁴³

The day has fortunately passed when a King like Charles I (1629-1640) could declare that:

he should account it presumption for any to prescribe a time to him for Parliament, the calling, continuing or dissolving of which was always in his own power; and he should be more inclinable to meet Parliament again, when his people should see more clearly into his intents and actions, when such as have bred the interruption shall have received their condign punishment.⁴⁴

Todd tells us in what instances parliament may be dissolved, which apply generally to every other constitutional country: First, in order to take the sense of the country in regard to the dismissal of ministers by the sovereign; secondly, on account of the existence of disputes between the two Houses of Parliament, which have rendered it impossible for them to work together in harmony; thirdly, for the purpose of ascertaining the sentiments of the constituent body in relation to some important act of the executive government, or some question of public policy upon which the Ministers of the Crown and the House of Commons are at issue; fourthly, whenever there is reason to believe that the House of Commons does not correctly represent the opinions and wishes of the nation.⁴⁵

These views are indorsed by various English constitutionalists, who all agree that after the dissolution of Parliament, for any reason whatever, and the decision of the electorate upon the question at issue, both Crown and Cabinet are bound to abide by the verdict of the country. "If the House of Commons disapproves the policy of the Cabinet," says Freeman, "they have the choice to resign or to appeal to the country by a dissolution of Parliament; but if the new Parliament also declares against them, then it is their duty to resign." ⁴⁶ Hearn, also referring to this point, says:

It is that if the constituent body support the representative body, if the House of Commons remain of the same opinion as its predecessors,

⁴³ Hearn, *ibid.*, p. 114.

⁴⁴ Hallam, *The Constitutional History of England* (1897), Vol. I. pp. 411, 412.

⁴⁵ A. Todd, *Parliamentary Government in England*, Vol. II (1869), p. 405 *et seq.*

⁴⁶ Freeman, *ibid.*, p. 116 and p. 210, note 2.

that opinion shall prevail. . . . The Ministry must abide by the results of general election. . . . When the King is unwilling to accept the advice of Parliament . . . he can, if he sees fit, seek for advice in a new House of Commons, and he ought to follow the advice which the House tenders.⁴⁷

Courtney says that "in the election of a new House of Commons the sense of the country is taken; and its authority is accepted as indisputable in connection with the issue or issues presented at the election;" and that "the authority abides until some occasion arises when it is seriously questioned whether the view of the majority of the House remains in accord with the national will."⁴⁸ According to Sir William Anson "for a dissolution of Parliament effected by the Sovereign *proprio motu* without the advice or against the advice of his Ministers, we must go back to the days before responsible Government."⁴⁹ By ministers is no doubt meant those enjoying the confidence of Parliament and not mere nominees of the Crown. Professor Dicey, commenting at length upon the subject of the dissolution of Parliament, says that "a dissolution is in its essence an appeal from the legal to the political Sovereign," and is "allowable, or necessary, whenever the wishes of the Legislature are, or may fairly be presumed to be, different from the wishes of the nation," that "the chief object of a dissolution is to ascertain that the will of Parliament coincides with the will of the nation," and that "the rules as to the dissolution of Parliament are, like other conventions of the Constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State." In conclusion, he says "the right of dissolution is the right of appeal to the people, and thus underlies all these constitutional conventions which, in one way or another, are intended

⁴⁷ Hearn, *ibid.*, pp. 151, 154 and 156; see also May, *ibid.*, p. 91, and for examples of dissolutions of Parliament, pp. 88 and 91.

⁴⁸ Courtney, *ibid.*, pp. 13, 14; see also the judicious observations on this point of W. Bagehot, *The English Constitution* (1877), pp. 295 *et seq.*

The Liberal Party at one time contested the right of a Cabinet formed from a minority in the House of Commons to obtain from the Crown a dissolution of the Parliament. For debates on this point in the House of Commons and speeches of Gladstone and Disraeli, see Hansard, third series (1867-8), cxcii, pp. 1687-1702-1712.

⁴⁹ Anson, *ibid.*, Vol. I, p. 304.

to produce harmony between the legal and the political sovereign power."⁵⁰

Continental European constitutionalists indorse, in a general way, the views of English writers on this question. Esmein says that although this prerogative, in appearance, seems to be contradictory to parliamentary government, still as a dissolution is immediately followed by new elections, the final decision is in the hands of the voters.⁵¹ Professor Duguit, after acknowledging that the right of dissolution is borrowed from England, says that "by a series of changes the right of dissolution became one of the essential machineries of the parliamentary regime. One can say," he adds, "that it has ceased to be a royal prerogative and has become a ministerial right — the counterpart of ministerial responsibility to Parliament."⁵² Another French writer in an admirable treatise on the dissolution of Parliaments, after referring to the right of Chiefs of State to dissolve their legislature, says:

In the hands of an absolute monarch, who struggles with the national assembly of representatives, the right of dissolution would become a weapon of combat. . . . This right in the hands of a prince who spontaneously grants a representative government, . . . and who does not find the representatives as easy tools of his will, will be availed of in order to secure a more pliant legislature. Such is the case in Germany, where the frequent dissolutions of the Reichstag have no other object but to secure a majority subservient to the plans of the Chancellor. If the right of dissolution had no other object, the progress of parliamentary government would have a tendency to cease. To use this prerogative as an instrument of combat against Parliament, would give to it perhaps the application which it originally had, but it would be a violation of the first law of parliamentary government, namely, the respect due to national representation.

He adds further that "to propose a dissolution without any question of principle being involved, without having any serious reasons to presume that the country will give a sufficient majority to the government, is a proceeding unanimously condemned by public men."⁵³

⁵⁰ Dicey, *ibid.*, pp. 428-434; see also John W. Burgess, *Political Science and Comparative Constitutional Law*, 1902, Vol. II, p. 214.

⁵¹ A. Esmein, *Éléments du droit Constitutionnel* (1906), p. 351, note 2.

⁵² L. Duguit, *Traité de droit Constitutionnel* (1911), Vol. II, p. 424; see also Barthélemy, *ibid.*, pp. 81-82.

⁵³ P. Matter, *La Dissolution des Assemblées Parlementaires* (1898), pp. 10, 11, 193.

This French jurist indorses the views of the English constitutionalists that after the elections the executive is bound to abide by the verdict of the people given by their votes. He very wisely observes that a chief of state who made a frequent use of this right would "show a strange contempt for the legislative power and would profoundly shake the confidence which he ought to inspire to the country. The people would be irritated and there would be, between the government and the nation, one of those conflicts which do not find their solution but in a revolution. History," he adds, "furnishes many examples. Charles X (of France) died in exile for having disregarded the rights of the national representation."⁴⁴

A distinguished member of the French Academy, writing during the time of Napoleon III, says that the right of dissolution may be dangerous in the hands of a president of a republic on account of his party affiliations, but not in those of a constitutional monarch, because "such a sovereign, being placed above parties . . . his only interest and duty is to observe with vigilance the game of politics, in order to prevent a great disorder." He pictures an ideal king who studies constantly public opinion and sees if it is in harmony with the views of the representatives of the nation, and intervenes at the proper time by using the right of dissolution. "This Superintendent-General of the state," he adds, "should remain the arbitrator of parties and not belong to any of them. He should not show his preference for any cabinet, for any person, and, if possible, for any opinion." Such a sovereign, according to the French academician, should accept with pleasure every cabinet enjoying the confidence of the nation, and abandon it as soon as it should lose such confidence. "In short," he says, "a constitutional king should never lose sight of the nation, which is the final judge of majorities and cabinets." Commenting upon whether a sovereign should dissolve Parliament more than once, he says that if such dissolution was effected through the initiative of a cabinet because it lost the confidence of the representatives of the nation, or by the sovereign, in order to find out the national will on some question, such step should be taken but once against the same cabinet during the term of such legislature. In other words, if the

⁴⁴ Matter, *ibid.*, pp. 274, 275.

elections go against the ministers in power at whose request the legislature was dissolved, they should resign and not have the right to ask for another dissolution. Similarly, if the dissolution was due to the spontaneous act of the king, although the cabinet was supported by the majority of the members of the legislature, the sovereign should not resort to another dissolution because the elections proved favorable to the cabinet.⁴

Such precisely has been the contention of Mr. Venizelos, who, after the dissolution of the Bouli in the course of the year 1915, in which he already had a majority, carried the elections of June, 1915, with a sufficient majority and came again into power. King Constantine, however, again dissolved the Bouli in November, 1915, although no new issue had arisen since the last elections: on the contrary, the issue was the same, namely, the participation by Greece in the European War on the side of the Entente Allies and the carrying out of the obligation of the treaty of alliance with Serbia.

The same views exist and the same practice prevails in regard to the dissolution of Parliament in every country endowed with a constitutional regime. Thus an Italian constitutionalist, after referring to the right of the King of Italy, according to the letter of the Constitution, to dissolve the Chamber of Deputies, asserts that the English parliamentary system prevails also in that country, and although, he says, the adoption of that system is at variance with the letter of the Italian Constitution, it is nevertheless in harmony with the "conception of liberty and the function of the Crown in a free State."⁵ According to a Belgian author, "the Belgian Chambers may be dissolved by the King when they have ceased to reflect the opinion of the country or when the division of parties impedes the formation of a steady majority in the Chambers."⁶ Another Belgian writer says that the dissolution of the Chambers is far from being an attack on

⁴ *Principes-Pratiques de Droit Vénizelos*, 1908, pp. 144, 145-146.

Matter is however, of course, that the newly elected legislature may again be dissolved if a new question arises different from the one at issue during the elections. *Matter*, *loc. cit.* p. 17.

⁵ *L. Palma, Corso di Diritto Costituzionale*, Vol. II, p. 325. Also *Nuovo Trattato di Diritto*, Vol. XII, 1918, pp. 623 & seq.

⁶ *A. Jans, op. cit.* p. 111.

the rights of the people. It is on the contrary a formal recognition of the national sovereignty. It is an appeal to find out the opinion of the people.⁵⁸

According to Article 27 of the Constitution of Greece, the King "has the right to dissolve the Boulé," but "the decree of dissolution should be countersigned by the Ministry." It is upon this provision of the Constitution that King Constantine founds all his theory of the so-called royal prerogative of dissolving the legislature whenever he pleases to resort to such a measure irrespective of the result of the elections. He evidently forgets that the principles of parliamentary government and the customs prevailing in other constitutional countries apply also to Greece. Besides, these usages have received their application in that country during the long reign of George I, the father of the present sovereign; and no such question was ever raised from the time of the adoption of the Constitution in 1864 up to the death of the late King, namely in 1913.

Philaretos, commenting upon the action of King Constantine in repeatedly dissolving the Greek Legislature, says:

If the dissolution of the Boulé after the [first] forced resignation of Mr. Venizelos, was ordered by King Constantine because the Crown thought that the people disagreed with the policy of the then government, the verdict of the country given at the elections of June, 1915, dispelled any doubt as to the opinion of the people. If the Sovereign had the right, each time there was a disagreement of opinion (between the Crown and the Ministry) to dissolve the Boulé in an unlimited manner, he could, whenever he pleased, change the royal democracy into a monarchy and could thus base his rights on the text of the Constitution itself.⁵⁹

It is this pretension of the King that was challenged by Mr. Venizelos and his party. Speaking in the Boulé on November 3, 1915, after admitting that the Crown may dissolve Parliament if it believes that the government is not in harmony with the public, Mr. Venizelos said: The elections which took place in June, 1915, settled that point and the King should have abided by the verdict of the country, and not have

⁵⁸ J. J. Thonissen, *ibid.*, p. 227.

The King of Norway is the only constitutional sovereign who does not have the right to dissolve Parliament. J. Morgenstiere, *Das Staatsrecht des Königreichs Norwegen* (1911), pp. 59, 69, quoted by Jellinek in *Allgemeine Staatslehre* (1914), p. 683, note 2; also by Matter, *ibid.*, p. 236.

⁵⁹ Philaretos, *ibid.*, pp. 148-149.

ordered, without any reason whatever, a new dissolution and new elections. If you [addressing some members of the Boulé, who supported the King,] believe that according to the meaning of our liberal Constitution the Crown has the right, after an appeal to, and the verdict of, the people, not to follow the will thereby expressed [by the nation], but contend that he [the King] may resort to a new dissolution for the so-called purpose of seeking a new verdict of the people, and subsequently again another verdict, you must admit that the liberal constitutional regime of Greece, under which we have lived for half a century, has become worse than a rag.⁶⁰

In a manifesto to the Greek people in December, 1915, Mr. Venizelos, referring again to this question, said:

After fifty years of free constitutional life, when the people of Greece had succeeded by a supreme effort to accomplish a part of their national programme, the Constitution is transformed into a real scrap of paper. . . . We see the inauguration in Greece, by means of successive dissolutions, of a system of government which can only have a meaning in a monarchical country where the supreme organ of the state is the monarch.⁶¹

Subsequently Mr. Venizelos, through his mouthpiece, the newspaper *Keryx*, commenting upon the statement by the King to a newspaper correspondent that he "can dissolve Parliament and dismiss his ministers whenever he wished so to do," said:

This is the Prussian theory according to which the King does what he judges is best for the country. In Greece, it is the sovereign people who are the judges, because, according to the Constitution, the authority is exercised not by him (the King) but by the responsible ministers. In Greece the Constitution is the result of a revolution against arbitrary power (that of King Otho), and it expressly safeguards the national sovereignty. The people are in Greece the sovereign of the political power. By the elections it (the Constitution) does not suggest, but imposes upon the Crown the selection of the responsible ministers. Only when there is a justifiable reason to believe that the government represented by the Boulé has ceased to be in harmony with public opinion, can that body be dissolved. But the Crown should abide by the verdict of the elections. In Greece it is the people that are the sovereign and not the King.⁶²

Discussing the same question again on May 8 (21), 1916, Mr. Venizelos quotes King George I (the father of Constantine) when he

⁶⁰ Supplement to *Patris*, *ibid.*, pp. 72, 73.

⁶¹ *Times*, December 7, 1915.

⁶² *Keryx*, of Athens, May 7 (old style), 1916.

was advised in 1904 to dissolve the Boulé, as saying, "I am a constitutional King. I am not the leader of a party, nor will I ask to be one in order to struggle with parties."

"To sum up," wrote Mr. Venizelos on May 29, 1916, "King Constantine, by seeking to impose his own political programme and showing his indifference to the popular vote, tramples underfoot the Constitution and arrogates to himself an authority which does not belong to him, transforming himself into a guardian of the people, while he is only the first organ of the state."⁸³

History furnishes many examples of constitutional kings who, dazzled by the halo that attaches generally to Royalty, or misconstruing the prerogatives attached to the Crown, have encroached upon the liberties of the people, and from constitutional sovereigns became overnight fullfledged autocrats. Now what remedy can the people have against such a person who, in the eye of the law, unlike any other mortal, is irresponsible?

Mr. Gladstone, after observing the absence of a law in England for calling the sovereign to account except in the case of his submitting to the jurisdiction of the Pope, says: "Regal right since the revolution of 1688, being expressly founded upon contract, the breach of that contract destroys the title to the allegiance of the subject" and, assuming such a breach possible, "the Constitution would regard the default of the Monarch, with his heirs, as the chaos of the State, and would simply trust to the inherent energies of the several orders of society for its legal reconstruction."⁸⁴ The historian of modern Greece (Finlay) is astonished that "modern statesmen should persist in repeating the philosophic and feudal nonsense (royal irresponsibility) which they are in the habit of inserting in the Constitutions they frame." "It would be difficult," he says, "to see what is precisely meant by royal irresponsibility in a Constitution which proclaims the sovereignty of the people. . . . The fiction of royal irresponsibility or divine right and the phrase 'the King can do no wrong' are incitements to the destruction of Constitutions by what are called *Coups d'État*."⁸⁵ Even

⁸³ *Keryx*, May 29 (old style), 1916.

⁸⁴ Gladstone, *Gleanings of Past Years*, Vol. I, pp. 227-228.

⁸⁵ *History of Greece* (1877), Vol. VII, p. 326.

such an admirer of constitutional royalty as Prevost-Paradol, after drawing an ideal picture of a constitutional sovereign, remarks:

Human nature is subject to such errors and is capable of such blind pride, that it is difficult to find a man who would accept without *arrière pensée* this great rôle and resist the mean temptation of becoming the chief of one of the [political] parties. To become a kind of permanent, irremovable Prime Minister and to contest with Cabinets and Parliaments the reins of power, is (who would believe it) the sad ambition of certain Constitutional Kings, who, according to the words of the poet, aspire to descend. The difficulty of finding a good Constitutional King is not less than the difficulty of doing without one.⁶⁶

King Constantine's usurpation of power, with all the evil consequences that have resulted from it, are too obvious to deserve a lengthy comment. The King is a soldier both by inclination and education. His arbitrary temperament more than once alarmed even his late father (George I) and was the cause of his expulsion from the army. Now, using the influence which he acquired over the army during the successful Balkan campaigns, he has determined, according to all accounts, with the connivance and aid of powerful monarchs who share his views, to transform the "royal democracy" into a real "autocracy."

Had King Constantine adhered to the principles of the Constitution, which he promised under oath to uphold, instead of trying to obscure its meaning by legal quibbles; had he honestly used his prerogative within the spirit of the Constitution, both in the internal administration and in the conduct of foreign affairs, by limiting himself to advices and warnings, as becomes a constitutional sovereign, and left to his ministers, who enjoyed the confidence of the nation, the direction of the policy of the country; had he, in short, allowed ministerial responsibility to come between him and public affairs, his ministers would have been for him, as Mr. Gladstone says, "like armor between the flesh and spear that would seek to pierce it," and "dignity and visible authority" would have been "wholly with the wearer of the Crown, but

⁶⁶ Prevost-Paradol, *ibid.*, pp. 150, 151. "It is said," wrote Freeman, "that the heathen Swedes when their public affairs went wrong . . . offered their King in sacrifice to God." (*Ibid.*, pp. 28, 29.) This idea may possibly appeal to some of the European nations after the present war in order to prevent national calamities attributed to their kings.

labor mainly, and responsibility wholly, with its servants." ⁶⁷ This illustrious English statesman (whose statue still adorns the entrance of the National University at Athens) in speaking of the influence of a constitutional king in public affairs, says:

It is a moral, not a coercive, influence. It operates through the will and reason of the Ministers, not over or against them. It would be an evil and a perilous day for the Monarchy were any prospective possessor of the Crown to assume or claim for himself final, or preponderating, or even independent power, in any one department of the State. Such action for the Sovereign would mean undefended, unprotected action; the armor of irresponsibility would not cover the whole body against sword or spear; a head would project beyond the awning and would invite a sunstroke. ⁶⁸

Mr. Venizelos has said that "if the Crown continues to be covered by his irresponsible advisers, who are not supported by the popular verdict, this cover will unfortunately become like a spider's web and be carried away by the first blow of a contrary wind, leaving the Crown unprotected, so that it may directly give an account of its actions. But the rendering of an account of its actions by the Crown would upset the principal virtue of the royal regime, namely, the stability of irresponsible authority, and would shake that very regime." ⁶⁹

King Constantine was born and brought up in Greece; he studied the writings of the ancient Greek sages, in the very city which was the cradle of liberty and democracy in ancient times, and which, up to recent times, was the asylum of the persecuted Greeks of Turkey; in fact it is to Athens that were constantly turned all the eyes of *Grecia irre-denda*, but suddenly the King of the Hellenes attempts, under German inspiration and influence, to subdue any feeling and suppress every sentiment expressed for the liberation of the Hellenic populations still under the Ottoman rule. The western coast of Asia Minor, still peopled, as in ancient times, by the descendants of the Greek colonists, has been heralded by the King's satellites as "a colony" and unworthy of any effort to possess it, simply because it came under the German sphere of influence. The whole policy of King Constantine — assuming that a constitutional sovereign can have a personal policy — is not to thwart

⁶⁷ Gladstone, *Gleanings of Past Years*, Vol. I, pp. 229–230.

⁶⁸ Gladstone, *ibid.*, 233. ⁶⁹ *Keryx* (of Athens), May 1 (old style), 1916.

the plans of his brother-in-law, Emperor William II, at any price nor in any place. Hence the amazing happenings recently in Hellas, namely the surrender at the behest of Germany of fortresses which had cost millions to build, together with an immense amount of artillery and munitions and other war paraphernalia, all intact. Likewise the surrender also of a part of the richest territory of Greece to her bitterest enemy, Bulgaria. And, finally, the transportation of about 8,000 Greek troops as prisoners of war to Germany, a country with which Greece is at peace.

The publication recently by some Greek officers of the secret agreements with Germany shows that the surrender of the fortresses with their munitions was prearranged for the purpose of strengthening the military situation in Macedonia of the Central Powers. Admiral Countouriotis, who is now a member of the provincial government in Salonica, stated recently that this surrender was done without the knowledge of the Greek Cabinet, of which he was a member at that time, but that it was the work of the King himself and carried out with the knowledge only of his Prime Minister and another member of the Cabinet (Mr. Gounaris), who is the principal tool of the Court. It should be noted that this proceeding is also contrary to the express provision of the Constitution (Article 99) according to which no foreign army can remain in Greece, nor can it go through her territory without a law, which means that the assent of the Legislature was absolutely necessary in this case.

In consequence of the system of absolute monarchy inaugurated in Greece by King Constantine no other authority is now left in that ill-fated country,—at least in the part still under his rule,—except that of the King himself, every vestige of other authority has been totally suppressed. All the safeguards provided by the Constitution for the liberty of the press, the expression of public opinion in mass meetings, security of property and personal liberty have been entirely brushed aside.

Certainly neither the warriors of the war of Greek Independence nor subsequent generations ever imagined that Hellas, the cradle of liberty, would, nearly a century after her emancipation from Turkish tyranny, be transformed into an Asiatic or African sultanate. But

King Constantine evidently forgets that Nemesis, who, according to tradition, is of Hellenic origin, cannot indefinitely witness the ruin of a nation to satisfy the personal policy of its monarch. In a recent interview (March 15, 1917) with the correspondent of the Havas News Agency, Mr. Venizelos predicted: "In the impossible event of Germany being victorious, King Constantine will set up an unbridled autocracy, but if Germany, as I am certain, is finally vanquished, King Constantine, who stepped down from a constitutional throne to become a mere party leader, will have to submit to the consequences of the defeat of his policy just as any other party leader when beaten."

THEODORE P. ION.

THE DESTRUCTION OF NEUTRAL PROPERTY ON ENEMY VESSELS

IN 1785 Prussia ratified a treaty with the United States providing in its twenty-third article ¹ that in case of war between the contracting powers:

All merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessities, conveniences, and comforts of human life more easy to be obtained, and more general, shall be allowed to pass free and unmolested; and neither of the contracting Powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce.

Prussia put this principle in force in 1866, in the war with Austria, on a basis of reciprocity,² and again in the Franco-Prussian War of 1870, although on the latter occasion the order was withdrawn as a measure of reprisal against France.³ Germany voted in favor of the proposition for the general immunity of enemy private property at sea introduced by the United States at the Second Hague Conference.⁴

Prussia was also a signatory of the Armed Neutrality of 1800⁵ and of the Declaration of Paris of 1856⁶ which provided among other things for the immunity of enemy goods on neutral ships and of neutral goods on enemy ships. German publicists have always been among

¹ Malloy, *Treaties*, p. 1484; Moore, *Digest of International Law*, 7: 461.

² Prussian Royal Order, May 19, 1866, *Gesetz-Sammlung für die Königlichen Preussischen Staaten*, 1866, p. 238; Moore, 7: 467.

³ Ordinance of North German Union, July 18, 1870, *Bundesgesetzblatt*, 1870, p. 485; repealed by German Ordinance, Jan. 19, 1871, *Reichsgesetzblatt*, 1871, p. 8; F. Perels, *Das internationale öffentliche Seerecht der Gegenwart*, 2d ed., Berlin, 1903, p. 200.

⁴ *Deuxième conférence internationale de la paix, Actes et documents*, 3: 834; Naval War College publications, 13: 126.

⁵ Convention, Prussia and Russia, 1800, Martens, *Recueil des principaux traités*, 7: 188; Moore, 7: 560.

⁶ Martens, *Nouveau Recueil Général de Traités*, 15: 791; Moore, 7: 562.

the foremost in advocating the freedom of the seas and the melioration of the situation of innocent private property thereon in time of war.⁷

In view of this record, the recent decisions of the German Supreme Prize Court in the cases of the *Glitra*⁸ and the *Indian Prince*⁹ appear to be an interesting departure from German traditions.

The *Glitra* was a British vessel, part of whose cargo was Norwegian. She was met by a German submarine on October 20, 1914, and sunk with her cargo. The Norwegian owner of the cargo brought action in the German prize court for compensation for his property, claiming that as it was exempt from capture by Article 3 of the Declaration of Paris, it must be paid for if destroyed. The claim was refused by the prize court and on appeal to the Supreme Prize Court the decision was affirmed. In brief, the court argued that the destruction of enemy vessels was legal. Although the question of the responsibility of the belligerent for neutral property destroyed on an enemy vessel had been discussed at the London Naval Conference, no decision was reached. Article 114 of the German Prize Code, which was believed by the claimants to provide for compensation in such cases, was held to apply only to innocent goods destroyed on *neutral* vessels. The court then concluded:

Thus obliged to revert to the most general legal principles in connection with the general laws of war, it is absolutely evident that a claim in favor of the neutral does not exist, if the destruction of the prize was justified by the circumstances. (Prize Ordinance, Art. 112.)

Since seizure is a legal act, there is no legal basis whatever upon which to found an injury to the goods, which the neutrals have, moreover, themselves caused by entrusting their property to an endangered ship. Therefore, since seizure is a legal act of war, there is no legal basis for establishing the injury to the goods, even if they are lost through an act of war directed against the ship, when owing to the circumstances, such an act must necessarily also be directed against the cargo.

⁷ Perels, *op. cit.* p. 200; H. Wehberg, *Capture in War on Land and Sea*, trans. J. M. Robertson, London, 1911, is throughout an appeal for the abolition of prize right.

⁸ The *Glitra*, *Oberprisengericht*, Berlin, July 10, 1915, *Zeitschrift für Völkerrecht*, 9: 399; this JOURNAL, 10: 921.

⁹ The *Indian Prince*, *Oberprisengericht*, Berlin, May 15, 1916, this JOURNAL, 10: 930.

In regard particularly to the condition of naval war, however, Article 3 of the Declaration of Paris gives protection neither in general nor specifically to neutral property against the actions of the belligerents due to the necessities of war. The purpose of Article 3 of the Declaration of Paris was to extend protection to neutral property in an enemy ship which under the prize law as it existed prior to the Declaration was subject to capture. What the necessities of war demand must be allowed to take place, whether neutral property is on board the ship or not. If, according to Article 2 of the Declaration of Paris, the neutral flag protects enemy property, this does not mean that, *vice versa*, neutral property protects the enemy ship, and protects it, indeed, not only against destruction, but also in many cases against every exercise of prize law.

The case of the *Indian Prince* was almost parallel. It also was a British vessel captured and destroyed by the German cruiser *Kronprinz Wilhelm*. Nationals of several neutral states, including the United States, owned portions of the cargo, and claims for compensation were made as in the previous case, the Americans putting in special claims on the basis of the treaty of 1828 between Prussia and the United States reviving Articles 12 and 13 of the treaties of 1785 and 1799 respectively.¹⁰ The treaties were held inapplicable¹¹ and the decision in the case of the *Glitra* was affirmed. Explaining its reasons in greater detail, the court said:

The question here is whether the commander is compelled by international law to refrain from sinking an enemy vessel when he has a legal right to do so, because its destruction would mean the loss of the neutral goods on board, especially if it is impossible for him to bring the vessel in. After repeated examination the court must con-

¹⁰ Malloy, pp. 1499, 1481, 1491.

¹¹ Article 12 of the treaty of 1785 providing for "free ships free goods" was held to have no application. Art. 13 of the treaty of 1799, which provides for the pre-emption rather than confiscation of contraband articles, states that "no such articles carried in the vessels or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and loss of property to individuals." The American owner of the cargo claimed that the alternative referred to goods belonging to "subjects or citizens" and on the high seas in enemy vessels. The court pointed out that, in the first place, the English version was a mistranslation of the French which read "*à bord des vaisseaux des sujets ou citoyens de l'une des parties*," and hence would furnish no grounds at all for a claim for goods on enemy vessels. Even taking the English version, the court thought it could only refer to actual carriage by the "subjects or citizens," that is, transportation in vessels owned by them.

tinue to answer this question in the negative. In this respect reference can only be made to the former decision. In particular it is incorrect to say that the former decision was based on the fact that by shipping their goods in an enemy vessel, the shippers took the risk of capture and destruction and therefore could not claim compensation. On the contrary, in taking a general view of the matter, the expression to the effect that neutrals had the free choice whether they would entrust their goods to the enemy ship and run the risk in connection therewith, is only used in order to show that the denial of compensation is correct, not only from a legal point of view, but also cannot be considered as unreasonable.

The principal reason which is decisive of the case in question lies in the actual dependence of the cargo on the fate of the ship, in consequence of which the cargo has to suffer the injury resulting from an act directed against the ship, legally committed according to prize law. It cannot be seen why the principle which is generally acknowledged and placed beyond doubt by the report of the drafting committee upon Article 64 of the Declaration of London should apply only to the capture of a ship and not to its just destruction.

It is not proposed to consider the rule of these cases in reference to its effect on neutral commerce or to its military expediency from the standpoint of one of the belligerents, although the rule which must ultimately prevail will doubtless result from a balancing of these two factors. This discussion will be limited to a consideration of the correctness of the decisions of the Supreme Prize Court on the basis of the law before it.

From this standpoint it is necessary to consider: (1) the law applied by German prize courts; (2) the rule, on this question, in the German Prize Ordinance; (3) the rule of international law.

1. THE LAW APPLIED IN GERMAN PRIZE COURTS

It has been a commonplace of Anglo-American jurisprudence since the days of Lord Stowell that prize courts are courts of international law, bound to apply its principles in order to insure the rights of neutrals against undue aggression of the belligerent governments.¹² In con-

¹² Report of British Commissioners on the Silesian Loan Controversy, 1753, British and Foreign State Papers, 20: 889; Moore, 7: 603; the *Flad Oyen*, 1 Rob. 135 (1799); the *Maria*, 1 Rob. 350 (1799); the *Schooner Adeline*, 9 Cranch 244; the *Paquete Habana*, 175 U. S. 677 (1901); the *Marie Glaeser*, L. R. (1914), P. 218. See also Moore, 7: 598.

formity with this view of their functions, specifically established by statute, British prize courts have held that an Order in Council contrary to international law is void.¹³

This conception of prize courts, however, differs widely from that generally held on the Continent. There, the primary function of prize courts is considered to be, not the protection of neutrals, but the protection of the government against acts by its naval forces in violation of their orders and instructions.¹⁴ It thus happens that Continental prize courts do not look primarily to customary international law, but to the laws and ordinances of their own government directing the conduct of naval forces.

This view was clearly expressed by the German prize court in the case of the *Batavier V*:¹⁵

A part of the claimants have in the oral proceedings given expression to the view that prize courts have to apply international, not national, law and especially not the contents of the German Prize Ordinance of September 13, 1909, since this does not have the character of a rule of law.

This is not the case.

The prize courts are national courts. They are established by their state to determine whether the legal standards to which the naval organs should adhere according to their instructions are observed or not, and to declare their conclusions thereon. From their purpose it follows that they have to judge according to the law established by their state, whether or not it agrees with the principles of international law. Whether this is the case is not the affair of prize courts to judge, but of the belligerent states, which alone are answerable therefor, to other states. The principle sustained by statements of the older literature, that prize courts have to apply international law even if it does not agree with their national law is then thrown out on fundamental principles. (See Heymann, *Deutsche Juristenzeitung*, 1914, p. 1048; Wehberg, *Seekriegsrecht*, p. 321.) They (prize courts) would

¹³ The *Fox*, Edw. Adm. 312 (1811); the *Zamora*, L. R. (1916), 2 A. C. 77, this JOURNAL, 10: 560.

¹⁴ H. Bonfil, *Manuel de Droit International Public*, 6th ed., Paris, 1912, p. 851, and authorities there cited. See also *Cushing v. U. S.*, 22 Ct. Cl. 1, Scott, Cases, p. 929; Commissioner Pinckney, in the *Betsey* (U. S.) v. Great Britain, Moore, Int. Arb., 3: 3182; Dana, Notes to Wheaton, p. 480.

¹⁵ The *Batavier V*, *Prisengericht*, Hamburg, June 1, 1915, Dutch Orange Book, October, 1915, p. 106. The opinion in this respect was repeated verbatim in the case of the *Zuansstrom* on the same day, *ibid.*, p. 115.

also be unable practically to carry such principles into operation, for the content of so-called principles of international law is in many cases uncertain and not determined. So far as this is not the case, they might have lost their applicability as a consequence of the relations of the belligerents or through the alteration of their actual provisions. It cannot be expected, for instance, of a belligerent party, whose opponent has broken an international agreement although it was concluded expressly for the event of war, to hold to it and to prescribe a further observance of it to his prize courts. And it needs no proof that certain principles previously valid as customary international law may become obsolete through the development of new forms of naval procedure, such as the submarine.

The argument, finally, that in case the prize court should judge according to national law, an international prize court, such as that provided by the Hague Convention XII of October 18, 1907, would be obliged, as an appellate court, to apply another law than the court of first instance, is shattered by the fact that an international prize court does not at present exist. Precisely, the recognition that the formation of this (considered by Heymann p. 1048, "phantastic") arrangement must have as a prerequisite the unification of the materials of prize law, lead at the end of 1908 to the calling of the London Naval Conference (Wehberg, p. 52) whose work, the Declaration of London, was destroyed by the opposition of England. Each of the participant states, at least in reference to the remaining signatories, would have been obliged to incorporate the law of the Declaration into its national law before an international prize court could have come into operation.

The national law is then to be applied. The German prize law is laid down in the prize Ordinance of September 13, 1909 (*Reichsgesetzblatt*, 1914, pp. 275, *et seq.*), covering essentially the contents of the Declaration of London. It is not true that this is exclusively an instruction for the naval commanders. The introduction ("I approve the following prize ordinance *and* decree. . ."), and especially a part of its contents, which can relate not to the acts of commanders, but only to those of prize courts, as that concerning the guarantee of compensation (Arts. 8, 121, par. 3), and that concerning condemnation (Arts. 17, 41, 42), prove the contrary. With Heymann (p. 1047), and Arndt (*Deutsche Juristenzeitung*, 1914, Vol. 19, p. 1154), the Prize Ordinance is considered primarily a legal ordinance founded on the imperial law concerning prize jurisdiction of May 3, 1884. (*Reichsgesetzblatt*, 1884, p. 49.)

The Supreme Prize Court has affirmed this view in the case of the *Elida*:¹⁶

¹⁶ The *Elida*, *Oberprisengericht*, Berlin, May 18, 1915, *Zeit. für Völk.* 9: 109, this *Journal*, 10: 916.

The prize regulations contain the principles laid down by the Kaiser as commander-in-chief within his imperial jurisdiction for the practice of prize law pertaining to naval warfare and are, therefore, primarily law not only for the navy but also for the inland authorities, particularly prize courts in so far as they have to pass upon the legality of the action of commanders at sea falling within the prize law.

International law only lays down rights and duties as between different states. The prize courts, when judging of the legality of prize actions, can take general international principles only into account when the prize regulations contain no instructions and, therefore, tacitly refer to the principles of international law. Therefore, the question whether an instruction of the prize regulations agrees with general international law is not for the prize court to decide. If a contradiction in this connection is asserted, the point in controversy is to be settled in another manner.

From these authoritative utterances there seems to be no doubt but that in the cases of the *Glitra* and the *Indian Prince* the German prize courts were, according to German law, under a primary obligation to apply the national laws and ordinances, especially the Prize Ordinance of 1909, and only secondarily general principles of international law.

2. THE RULE OF THE GERMAN PRIZE ORDINANCE

A number of articles of the German Prize Ordinance of Sept. 30, 1909,¹⁷ relate to the treatment and destruction of captured vessels. Article 111 contains a general requirement that all prizes be brought into port for adjudication. Article 112 states:

The commander may make use of an enemy vessel captured under the circumstances set forth in Arts. 10 to 16b as an auxiliary vessel, or if the bringing in of the vessel appears to him to be inappropriate or unsafe, to destroy the same. The same rule applies to a vessel captured under the circumstances set forth in Art. 56, provided it is certain that it can be proved in a prize court that the vessel be guilty of having rendered unneutral service of the graver kind.

Article 113 allows destruction of neutral vessels liable to condemnation, in certain extraordinary circumstances, and Article 114 provides:

Before the commander determines on the destruction of a vessel, he must consider whether the damage thereby done to the enemy

¹⁷ *Reichsgesetzblatt*, 1914, p. 275. A convenient translation has been published by C. H. Huberich and R. King, *The Prize Code of the German Empire as in Force July 1, 1915*, New York, 1915.

will outweigh the damages payable for the parts of the cargo not subject to condemnation (see Arts. 18, 42, 51, 56, and 80), and which are destroyed at the same time.

Article 115 provides:

If a neutral vessel is destroyed, and in the view of the prize court the circumstances enumerated in Art. 113b did not exist, the owners of the vessel and cargo, whether the same were liable to condemnation or not, are entitled to compensation for damages sustained. If the circumstances in question existed, but the vessel, or the neutral goods thereon, destroyed are held to be not liable to condemnation, the owners thereof have a similar right to compensation.

There is no question but that according to Article 112 the destruction of the *Glitra* and the *Indian Prince* was legal. The court, however, held that none of these articles required payment of compensation for the neutral property destroyed, specifically maintaining that Article 114 referred only to the destruction of a neutral vessel.

Judged from the intrinsic contents of the article and the evident purpose of the drafter, this decision is believed to be erroneous:

(1) The article does not specifically state that it is limited only to neutral vessels, and coming immediately after two articles relating respectively to enemy and neutral vessels, it might be supposed to embrace both categories. Articles 112, 113, and 115 each use the adjective *enemy* or *neutral* before vessel, as the case may be. As Article 114 alone omits the adjective, there seems to be a very strong implication that it refers to both types of vessel.

(2) The article itself refers to Article 18, in reference to the type of goods for which compensation must be paid. Article 18 lists the classes of goods in *enemy* vessels subject to capture, omitting neutral goods, thus incorporating the principle of Article 3 of the Declaration of Paris.

(3) The intent of the code may be inferred from the attitude of German text writers, which has been almost uniformly to assume the necessity of compensation in such cases,¹⁸ and especially from the official attitude of Germany at the London Naval Conference, which immediately preceded the drafting of the ordinance. On this occasion

¹⁸ Perels, *op. cit.* p. 290.

the draft presented by the German delegation provided in its 26th article:¹⁹

In the case provided in paragraph 18, Art. 25 (sale or destruction of prizes in certain cases), one can equally sink or destroy, with the vessel, the merchandise which is not susceptible of confiscation, and which by reason of the circumstances, cannot be transported to the vessel of war. In this case, the proprietor of the goods will have a right to indemnity.

Upon this proposal the German delegation commented:²⁰

In that which concerns the cargo of a vessel which one has the right to destroy, the confiscable merchandise can be freely destroyed with the vessel. The rest of the cargo ought to be transported to the other vessel, if the circumstances permit. In the case where the goods will be sunk with the vessel we propose, differently from the French memorandum, to recognize in the proprietor the right to a sufficient indemnity.

It is true that in the case of the *Glitra* the court made a half-hearted effort to reconcile this attitude with its present decision, saying:

Quite the predominant point of the debates was the question of the admissibility of the destruction of *neutral* vessels which were liable to seizure. In mitigation of such a case, Germany was in favor of allowing the neutrals a right of indemnity for goods not liable to seizure.

However, the statement of the proposition, and especially the comment on it, leaves no doubt but that it intended to give compensation for neutral goods destroyed on enemy vessels as well as on neutral vessels.

Finally, the court itself seems to have had qualms of conscience at its interpretation of Article 114, and sought to prove it inapplicable on other grounds. It said further:

Above all, it is of paramount importance that Article 114 be not *sedes materia*, and therefore, even supposing that the compiler of the regulations was of the opinion that in the case of the legal destruction of a hostile ship claims for compensation could be sustained for neutral goods, it would be incorrect to regard his opinion as a definitive decision of this at least doubtful, and at any rate disputed, but still open question.

¹⁹ British Parliamentary Papers, 1909, Misc. No. 5, p. 99; Nav. War. Col. pub. 11: 13.

²⁰ British Parl. Pap., 1909, Misc. No. 5, p. 171; Nav. War. Col. pub. 11: 79.

The court then attempts to show that the prize regulations are not positive law in all respects. "Thus Article 114 is indeed only a command to the commanders of men-of-war. The commander-in-chief, but not the legislator, speaks. He does not desire to make substantive law and he does not do so." This statement is impossible to reconcile with the decisions above quoted in the *Batavier V* and the *Elida*,²¹ in which it was emphatically laid down that the Prize Ordinance was law not only for naval officers but also for inland authorities, especially prize courts. In fact, one of the reasons given in the former decision for this view was that some of the provisions, especially those relating to guarantees of compensation, could only be applied by courts. If Article 114, referring to indemnity payable for innocent goods destroyed, is not, by this opinion, law for prize courts, it is hard to see what provisions would be.

3. THE RULE OF INTERNATIONAL LAW

Admitting, however, the court's contention that Article 114 was inapplicable, the question must be decided by international law. The resort to international law to fill in *lacunae* in the prize ordinances is the usual practice of German prize courts,²² and it was indeed specifically mentioned in the case of the *Glitra*:

Thus obliged to revert to the most general legal principles in connection with the general laws of war, it is absolutely evident that a claim in favor of the neutral does not exist, if the destruction of the prize was justified by the circumstances.

The international law on the question has received little discussion and is exceedingly vague. The cases usually cited and relied on by the German court were those of the *Ludwig* and the *Vorwärts*²³ handed down in 1872 by the French *Commission Provisoire*, which was temporarily acting for the *Conseil d'État* as the highest appellate prize court in France. These two German vessels had been captured by the French cruiser *Desaix* and sunk because the captor was unable to furnish a prize crew, since she had already depleted her crew by furnishing prize

²¹ *Supra*, pp. 362-364.

²² Huberich and King, *op. cit.* pp. xii, xvi.

²³ The opinions in these two cases are identical. *Arrêt du Conseil d'État*, 1872, pp. 777-778; Dalloz, Rept. Gen., 1872, 3: 94.

crews for other vessels captured, and also had forty-one prisoners on board who required the constant surveillance of her crew of thirty men. A British company which had lost property on the destruction of the vessels claimed compensation. This was refused by the prize court of Bordeaux, and the decision was affirmed on appeal:

Considering that by the terms of the Declaration of Paris of April 16, 1856, approved by the decree of the 28th of the same month, neutral merchandise is not seizable on board an enemy vessel, from which it follows that the neutral who has shipped his goods on this vessel has a right to restitution of his goods or, in case of sale, of payment of the proceeds, but that one can not deduce from this Declaration that he can claim an indemnity by reason of injuries which have been caused him, either through the capture of the vessel when that capture has been recognized as valid, or through acts of war which have accompanied or followed the capture.

Considering that it results from the instructions that the seizure of the *Ludwig* (and *Vorwärts*) has been judged valid and that the destruction of the vessel with its cargo took place on the order of the commander of the warship because, on account of the great number of prisoners on board, the security of his vessel did not permit of detailing a part of the crew to conduct the prize into a port of France.

That in these circumstances the destruction of the prize constituted an act of war of which the proprietors of the cargo can not be permitted to deny the legitimacy, and which can not give a right of indemnity to their profit.

So far as this decision stands for the rule that compensation need not be paid to neutrals for losses resulting from legal acts of war, it has been quite generally accepted by publicists, as for instance, De Boeck,²⁴ Dupuis,²⁵ Calvo,²⁶ Bordwell,²⁷ Atlay,²⁸ Atherley-Jones,²⁹ Hall,³⁰

²⁴ Charles DeBoeck, *De la Propriété Privée Ennemie sous Pavillon Ennemi*, Paris, 1882, sec. 146, p. 146.

²⁵ C. Dupuis, *Le Droit de la Guerre Maritime d'après les Doctrines Anglaises Contemporaines*, Paris, 1899, p. 340.

²⁶ C. Calvo, *Le Droit International théorique et pratique*, 5th ed., Paris, 1896, sec. 3033, 5: 279.

²⁷ Percy Bordwell, *The Law of War between Belligerents*, Chicago, 1908, p. 226.

²⁸ J. B. Atlay, note to Wheaton, 4th English ed., London, 1904, p. 507.

²⁹ L. A. Atherley-Jones and Hugh H. L. Bellot, *Commerce in War*, London, 1907, p. 717.

³⁰ W. E. Hall, *International Law*, 4th ed., p. 744.

and Oppenheim.³¹ Wehberg,³² however, makes the statement, although not directly in connection with this case, that "We must hold to the contention that war is not directed against individuals, and that where a necessity of war, even though wrongly alleged, dictates the capture, compensation must ensue." The German prize court in the case of the *Glitra* admitted that a number of German publicists had maintained the absolute obligation of compensation, and it should be said that the French Naval Instructions of 1870, by which the commander of the *Desaix* was bound, provided for the compensation of neutrals who lost property on destroyed enemy prizes.³³ The French court in its decision ignored this provision in the same manner as the German court appears to have done with the similar provision in the German Prize Ordinance.

But although none but German publicists have objected to the decision in the *Ludwig* and *Vorwärts* because of its failure to compensate the neutral sufferer (admitting the act legitimate), many publicists have held that there was not actually a military necessity to permit of the destruction of these vessels. The German Government was so strongly of this opinion that shortly after the event on January 9, 1871, it issued a circular dispatch stating:³⁴

In naval war the French have set themselves above international law; the French warship *Desaix* has destroyed by burning and sinking on the high seas three German merchant vessels which it had seized, the *Ludwig*, *Vorwärts* and *Charlotte*, instead of bringing them into a French port and leaving them to the judgment of a prize court. The German vessels have therefore been permitted to take reprisals against the French.

³¹ L. Oppenheim, *International Law*, 2d ed., London, 1912, 2: 244.

³² Wehberg, *op. cit.* p. 189. Perels, *op. cit.* p. 299, also insists on the necessity of compensation.

³³ The *Instruction Complimentaire* to instructions of July 28, 1870, art. 20 (Freeman Snow, *Cases on International Law*, p. 572) provided: "If compelling circumstances force a cruiser to destroy a prize, because its preservation compromises its own safety or the success of its operations, it is necessary to take care to preserve all the papers on board and other elements necessary to permit the judgment of the prize and the establishment of the indemnity to be awarded to neutrals whose property, non-confiscable, may have been destroyed. One ought to use this right of destruction only with the greatest caution." DeBoeck, *op. cit.* p. 146, notices the failure of the court to apply this instruction.

³⁴ *Reichsgesetzblatt*, 1871, p. 8; Perels, *op. cit.* p. 200. See also Moore, 7: 468.

The form of these reprisals was the repeal of the ordinance of July 18, 1870, which had provided for the immunity of enemy private property at sea.³⁶

Perels³⁶ is strongly of the opinion that there was not sufficient grounds for destruction in these cases, and Hall agrees with him, although expressing himself with more moderation. He says, after quoting the case:³⁷

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris.

DeBoeck,³⁸ Depuis,³⁹ Calvo,⁴⁰ and Bordwell,⁴¹ although limiting the right of destruction to extreme cases, think that the circumstances confronting the commander of the *Desaix* were sufficient. The results of this decision and the comments upon it thus appear to establish that compensation need not be paid if the act is really one of military necessity.

In the London Naval Conference of 1909 discussion was held on the question:⁴²

Ought the principle that neutral merchandise found on board an enemy vessel is not seizable, to be interpreted in the sense that in case of the destruction of the vessel the proprietor of the merchandise ought to be indemnified? Or that, since the destruction of the vessel constitutes an act of war, it does not give rise in law to a pecuniary responsibility chargeable to the belligerent.

³⁶ Perels, *op. cit.* p. 200, after stating the actual reason for the repeal of the order, notes that many publicists have wrongly attributed the withdrawal of general immunity to the failure of France to provide for reciprocity. See Twiss, *Des droits des belligérants sur mer depuis la Déclaration de Paris*, *Rev. de Droit Int.*, 16: 113.

³⁷ In his first edition (1882), after describing the cases in which destruction is legal, Perels says that the *Desaix* destroyed the German vessels "ohne eine dieser Voraussetzungen." In his 2d edition (1903) he relegates the matter to a footnote and modified the statement to "ohne hinreichende gründe."

³⁸ Hall, *op. cit.* p. 744.

³⁹ DeBoeck, *op. cit.* sec. 146, p. 146.

⁴⁰ Depuis, *op. cit.* p. 340.

⁴¹ Calvo, *op. cit.* sec. 3033, 5: 279.

⁴² Bordwell, *op. cit.* p. 226.

⁴³ British Parl. Pap., 1909, Misc. No. 5, p. 102, Nav. War. Col. pub. 11: 77.

France⁴⁵ presented a proposition in conformity with her stand in the cases of the *Ludwig* and *Vorwärts*. Great Britain,⁴⁶ Germany⁴⁵ and Japan,⁴⁶ on the other hand, proposed that compensation be allowed for all innocent neutral property destroyed on prizes, whether enemy or neutral, but no agreement was reached. It is true that Article 53 of the Declaration provides that, "If neutral goods which were not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation." This however, although it might be interpreted as establishing a general principle, is included in an article relating to the destruction of neutral prizes, and hence has no direct application to the case in hand. In the case of the *Indian Prince*, however, the German court relied specifically on a statement in the report of the Drafting Committee on Article 64. This article provides that:

If the capture of a vessel or of goods is not upheld by the prize court, or if, without being brought to judgment, the captured vessel is released, those interested have the right to compensation, unless there were sufficient reason for capturing the vessel or goods.

In commenting on it the Drafting Committee said:⁴⁷

Innocent goods on board a vessel which has been captured suffer all the inconveniences of the capture of the vessel. If there were sufficient reasons for capturing the vessel, whether the capture is or is not held to be valid, the owners of the cargo have no right to compensation.

The statement made by the court was as follows:

The principal reason which is decisive of the case in question, lies in the actual dependence of the cargo on the fate of the ship, in consequence of which the cargo has to suffer the injury resulting from an act directed against the ship legally committed according to prize law. It cannot be seen why the principle which is generally acknowledged and placed beyond doubt by the report of the Drafting Committee

⁴⁵ British Parl. Pap., 1909, Misc. No. 5, p. 30.

⁴⁶ British Parl. Pap., 1909, Misc. No. 5, p. 38, Misc. No. 4, p. 9. See also instructions to British delegates, Misc. No. 4, p. 28, Nav. War. Col. pub. 11: 69, 75.

⁴⁶ British Parl. Pap., 1909, Misc. No. 5, pp. 99, 171; Nav. War. Col. pub. 11: 73, 79.

⁴⁶ British Parl. Pap. 1909, Misc. No. 5, p. 276; Nav. War. Col. pub. 11: 80.

⁴⁷ Nav. War. Col. pub. 9: 153.

upon Article 64 of the Declaration of London, should apply only to the capture of a ship and not to its just destruction.

Without deciding at this point upon the merits of the general contention, it is submitted that Article 64 and the report thereon has no application to this case. In the first place, the article contains a grant of compensation in certain cases, and it seems to be a process of doubtful legitimacy to imply from this a denial of compensation in all other cases. Furthermore, the statement is carefully limited to "capture," which seems to differ radically from "destruction." As the remainder of the report shows, this article applies only to losses resulting from a decline of favorable markets, deterioration of goods, or other event caused by the delay of the vessel, in which case compensation for such incidental losses is not required if there was "probable cause" for seizure. The goods themselves must, of course, be restored,⁴⁸ or if, because of their perishable nature, they have been sold, the proceeds of the sale must be restored.⁴⁹ In short, the article relates only to incidental losses, not to the loss of the goods themselves. That the latter case was regarded as in an entirely different category is shown by Articles 51, 52, and 53, which require complete compensation for all innocent property destroyed on neutral vessels, and even for guilty property if there was not sufficient justification for destruction. It would seem that since the analogy is closer, there would be more warrant for applying Article 53 as a general principle applicable to this case, than Article 64, although with a strict interpretation neither of them are exactly in point.

The discussions over the case of the *Ludwig* and *Vorwärts* and the proposals presented to the London Naval Conference indicate that there are two fundamental questions involved, that of the right to destroy enemy prizes, and that of the right of neutrals to compensation for injuries received incidentally to the conduct of war. These may be conveniently discussed separately.

⁴⁸ Dec. of London, Arts. 21, 43. See also Hague Convention, VI. 1907, Arts. 2, 3.

⁴⁹ Moore, 7: 619.

4. DESTRUCTION OF ENEMY PRIZES

May enemy prizes be destroyed immediately (provided provision is made for the safety of the persons on board), or is there a duty to bring them into port for adjudication, which only yields to military necessity?

The first view was that taken by Russia during the Russo-Japanese War in reference not only to enemy but also to neutral prizes,⁵⁰ and supported by the Russian delegation in the Hague Conference of 1907⁵¹ and in the London Naval Conference.⁵² This view asserts that, if the capture is legal, title vests immediately in the capturing state; hence it is entirely within its discretion whether it will bring the prize in or destroy it. This view is clearly untenable with reference to neutral prizes, since the discussions arising from the Russo-Japanese War cases and the London Naval Conference,⁵³ but is still held by some countries, notably Germany, in reference to enemy prizes. The German Prize Code⁵⁴ permits the destruction of an enemy vessel if its bringing in would be "inappropriate or unsafe," and German practice has been to destroy enemy vessels at sea during the present war. Wehberg, in his *Capture in War on Land and Sea*, published in 1909, advocates the abolition of all prize right but thinks that while it is retained, "all the corollaries must be deduced from it," among which are the almost unlimited right to destroy prizes.⁵⁵ The way in which this right would be used is foreseen with startling clearness.⁵⁶

In any case, primarily the most valuable vessels, which are often the pride of whole communities — one has only to think of the splendid four-screw turbine steamer *Lusitania* of the Cunard line — are thereby exposed to the whole barbarity of the law of prize.

⁵⁰ Moore, 7: 519; Nav. War Col. pub. 11: 54.

⁵¹ *Deuxième conférence internationale de la paix, Actes et documents*, 3: 898; Nav. War Col. pub. 11: 62.

⁵² British Parl. Pap., 1909, Misc. No. 5, p. 268; Nav. War Col. pub. 11: 77.

⁵³ Dec. of London, Arts. 48-54; Nav. War Col. pub. 5: 62; 11: 51; Moore, 7: 516.

⁵⁴ German Prize Code, Art. 112, *Supra*, p. 364.

⁵⁵ Wehberg, *op. cit.* p. 96. The original edition of this work, entitled *Das Beuterecht im Land- und Seekriege*, was published in Tübingen, 1909. The references are to the English translation.

⁵⁶ *Ibid.* p. 59.

The reasons which dictate the championing of the right of destruction by certain countries is also clearly expressed.⁵⁷

Valois (*Germany as a Naval Power*) mentions that in a possible war between Germany and England, the German cruisers would have scarcely any chance of bringing their prizes into safety and they would therefore be forced to destroy them. The German zones of protection lie too far away from a probable theater of maritime warfare. The prizes we took would thus be generally recaptured from us by the English on the way to a German port. On the other hand, England, by a deliberate policy, has for hundreds of years acquired colonies everywhere and can easily carry prizes into one of its numerous ports. For this very obvious reason, England recognizes the destruction of prizes only in one single instance, i.e., where the vessel is incapable of continuing the voyage. In this respect, Russia is in an even more unfavorable position than Germany.

The specific orders given to naval commanders by the United States in the War of 1812 to destroy all prizes,⁵⁸ the usual practice of the Confederate privateers during the American Civil War,⁵⁹ the Russian practice during the war with Japan,⁶⁰ and the present German practice⁶¹ are all examples of action based on this reason.

A resolution limiting the right to destroy either enemy or neutral prizes to five exceptional cases was drafted by Bulmerincq in 1879 and adopted by the *Institut de Droit International* in 1882.⁶² This view was espoused by Great Britain, France and Germany at the London Naval Conference of 1909.⁶³ As has been said, Germany took this view in condemning the destruction of the *Ludwig* and *Vorwärts* by the French cruiser *Desaix* in 1871, and the German publicist Perels says: ⁶⁴

The destruction of the prize is authorized only in very exceptional circumstances. It must be thus in reality because of the absolute necessity which one is under to have recourse to the judgment of the

⁵⁷ Wehberg, *op. cit.* p. 96.

⁵⁸ American State Papers, Naval Affairs, 1: 373-376. Moore, 7: 516.

⁵⁹ Scott, Cases, p. 932.

⁶⁰ Moore, 7: 520; S. Takahashi, *International Law Applied to the Russo-Japanese War*, New York, 1908, p. 310 *et seq.*

⁶¹ J. W. Garner, *Some Questions of International Law in the European War*, this JOURNAL, 9: 594, 10:12.

⁶² *Annuaire de l'Institut de Droit international*, 6: 221; Moore, 7: 526.

⁶³ British Parl. Pap., 1909, Misc. No. 4, p. 28; Misc. No. 5, pp. 99, 101; Nav. War Col. pub. 11: 69.

⁶⁴ Perels, *op. cit.* p. 200.

court of prize to decide on the validity of the capture. [After stating the circumstances justifying destruction, he continues.] Without any of these conditions existing, the French vessel *Desaix* destroyed with fire on the high seas on the 14th of October, 1870, the German vessel *Charlotte*, and on the 21st of October the *Vorwärts* and the *Ludwig*. The circular dispatch of the Foreign Office of the North German Confederation of January 9, 1870, exposed this conduct as contrary to international law.

Other publicists, such as Dupuis,⁶⁵ De Boeck,⁶⁶ Calvo,⁶⁷ Hall,⁶⁸ and Bordwell⁶⁹ have stated that destruction of enemy vessels is justified only by absolute military necessity. The United States Naval War College advised in 1905 that great caution be exercised in the destruction of enemy prizes because of the possibility that neutral property be involved.⁷⁰

The *Ordonnance de la Marine* promulgated by Louis XIV in 1681 incorporated drastic measures from earlier ordinances of 1400, 1517, 1543, and 1584 to prevent the destruction of prizes by privateers.⁷¹ "It is forbidden on penalty of death to all commanders, soldiers and sailors to sink prize vessels and to deposit the prisoners on islands or distant coasts in order to conceal the prize." This ordinance, which suggests recent correspondence with reference to the safety of passengers on captured merchant vessels, was incorporated in Article 64 of the *Arrêté du 2 Prairial an xi*. Later French Naval Instructions of 1870⁷² and 1912⁷³ prohibit the destruction of enemy prizes, except in case of necessity, and in the cases of the *Ludwig* and *Vorwärts* the act was justified on that ground.

British and American courts have generally held that title to enemy

⁶⁵ Dupuis, *op. cit.*, p. 333, gives one of the fullest discussions of the destruction of enemy prizes.

⁶⁶ De Boeck, *op. cit.* sec. 146, p. 146.

⁶⁷ Calvo, *op. cit.* sec. 3033, 5: 279.

⁶⁸ Hall, *op. cit.* p. 744.

⁶⁹ Bordwell, *op. cit.* p. 226.

⁷⁰ Nav. War Col. pub. 5: 72, 121; 11: 52.

⁷¹ René Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine du mois d'Août 1681*, 2 vols., La Rochelle, 1766, liv. iii, tit. ix, art. 18. The commentator thinks that this would be interpreted leniently in case of military necessity for destruction. See also Pistoye et Duverdy, *Traité des Prises maritimes*, Paris, 1855, 1: 265, 269; Dupuis, *op. cit.* p. 339.

⁷² *Instruction Complémentaire* to instructions of July 28, 1870, Art. 20, Snow, Cases, p. 572.

⁷³ Instructions, Dec. 19, 1912, Art. 28; Nav. War Col. pub. 13: 192.

prizes does not vest until judicial condemnation, and, consequently, a primary duty exists to bring the prize in.⁷⁴ Naval instructions in Great Britain,⁷⁵ the United States⁷⁶ and Japan⁷⁷ have authorized the destruction of enemy vessels in a limited number of cases, while those of Russia⁷⁸ have given a wider discretion to naval commanders.

The German Prize Ordinance permits the destruction of enemy prizes at convenience.⁷⁹ The court assumed, however, in the cases of the *Glitra* and the *Indian Prince*, that since it was impossible for submarines to bring prizes in because of their small crews, an adequate military necessity existed. This brings up the question of whether the introduction of a new implement of warfare which can not be used effectively with a complete adherence to international law, offers justification for the alteration of that law. The question also arises whether the geographical disadvantages, from which a country like Germany suffers, justify destruction under conditions which would be unjustifiable in a country of more extended ports like England.

It is submitted that military necessity can only be invoked to justify the destruction of a prize in the presence of exceptional circumstances which were unforeseen and beyond human powers of control. Of this character would be the state of the sea, the unseaworthiness or slowness of the prize, or the depletion of the captor cruiser's crew by unforeseen circumstances. Circumstances which are the rule and known before the belligerent vessel leaves its home port, such as an

⁷⁴ "Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize, in a court of admiralty, judging by the law of nations and treaties." British Report on the Silesian Loan Controversy, 1753, Moore, 7: 603. *Oakes v. U. S.*, 174 U. S. 778, 786 (1899); the *Appam*, this JOURNAL, 10: 826 (1916); U. S. Naval Instructions, 1898, Art. 24 (For. Rel. 1898, p. 781); Stockton, Naval War Code, 1900-1904, Art. 49 (Nav. War Col. pub. 5: 114); Moore, 7: 623. In a few cases, American courts have held that title to enemy prizes passes on firm possession without judicial condemnation. The *Mary Ford*, 3 Dall. 188 (1795); the *Adventure*, 8 Cranch 221 (1814); the *Resolution*, 2 Dall. 1 (1781).

⁷⁵ Holland, Manual of Naval Prize Law, 1888, Arts. 303-304; Nav. War Col. pub. 5: 64.

⁷⁶ Instructions, 1898, Art. 28; 1900-1904, Arts. 49-50; Nav. War Col. pub. 5: 66.

⁷⁷ Instructions, 1894, Art. 22; 1904, Art. 9; Nav. War Col. pub. 5: 65.

⁷⁸ Instructions, 1895, Art. 21; 1901, Art. 40; Nav. War Col. pub. 5: 66.

⁷⁹ Prize Ordinance, 1909, Art. 112.

absence of colonial ports to which a prize might be sent, or the inherent inability of the type of vessel employed to carry a crew sufficient to furnish prize crews, can not be pleaded as grounds of military necessity. In the former case, the circumstances are exceptional and unpremeditated. In the latter, they are the rule and foreseen. In the former case, the intention is to bring the prize in, but circumstances have prevented. In the latter case, the intention is to destroy all vessels. If destruction nevertheless takes place in the second class of circumstances, it is not a legal act of war which might relieve the belligerent from the obligation to pay indemnity for incidental losses.

In conclusion it may be said that the necessity to bring enemy prizes in for adjudication exists, not only because of the possibility of neutral property being on board, but also because enemy vessels are not universally subject to condemnation.

5. COMPENSATION FOR NEUTRAL PROPERTY DESTROYED

Whether or not neutrals are entitled to compensation for goods destroyed on enemy vessels depends somewhat upon the circumstances of destruction. If destruction has been an act of war dictated by exceptional military necessity, then neutrals incidentally injured suffer as they would if they owned property in a city bombarded according to the law of war. On the other hand, if destruction is a normal incident of the capture of enemy merchant vessels, hedged about by no requirements of extraordinary military necessity, it seems clear that a failure to offer compensation would involve a direct violation of the 3d article of the Declaration of Paris.

A neutral may suffer without claim for compensation because of the *necessities* of a belligerent. It is very different to permit him to lose innocent property merely at the *convenience* of the belligerent. These conclusions are believed to be justified by the authorities cited in the discussion of the cases of the *Ludwig* and *Vorwärts*, and by the discussion at the London Naval Conference of 1909.

By combining the two points of view on the two questions respectively of destruction and indemnity, four possible solutions of the question result.

(1) The principle most lenient to the neutral would be that which forbids destruction of enemy vessels except in case of extraordinary necessity, and even then grants compensation for neutral property. This was supported by Great Britain and Germany in the London Naval Conference, and is in harmony with the principles incorporated in the Declaration of London in reference to neutral vessels. Admitting that all prizes ought to be adjudicated in prize court and that innocent neutral property on board even enemy vessels is inviolable, it seems to be the logical result. It probably goes farther, however, than belligerents with geographical disadvantages are likely to permit.

(2) Somewhat less advantageous to the neutral would be the principle which, while admitting the destruction of enemy vessels at convenience, requires compensation to be paid for innocent neutral property on all occasions. This rule is believed to have been intended by the drafter of the German Prize Code of 1909 and is advocated by some German publicists, such as Wehberg. It would seem to be the only solution which can reconcile the exercise of prize rights by belligerents lacking in port facilities, with the 3d article of the Declaration of Paris, unless neutral ports be opened to the sequestration of belligerent prizes, which is entirely out of harmony with the present tendency. This principle, however, would present great practical difficulties in administration, because, by the hypothesis, all evidence of the actual neutral property on board would probably be destroyed, and hence an inviting field for the prosecution of fraudulent claims by neutrals would be opened.

(3) The rule which refuses compensation for neutral property destroyed, but forbids the destruction of the enemy vessel except in case of extraordinary necessity, is in accord with the preponderance of international practice and opinion. It is supported by the cases of the *Ludwig* and *Vorwärts*, although in those cases there might arise a doubt whether sufficient necessity to justify destruction actually existed and also by most of the text writers. As Hall has said, however, the cases of military necessity would have to be sharply defined and limited or there would be danger of violating the Declaration of Paris.

(4) The harshest principle is that which not only permits of the destruction of enemy vessels at convenience, but also refuses compensa-

tion to the neutral owner of property on board. It is believed that this principle can find no justification in international law and is in fact in conflict with Article 3 of the Declaration of Paris, which embodies a principle as old as the *Consolato del Mare*.⁸⁰ No authority for the rule, aside from the recent German decisions in the cases of the *Glitra* and the *Indian Prince*, is known.

QUINCY WRIGHT.

⁸⁰ In the case of the *Glitra*, the court remarked that prior to the Declaration of Paris, neutral goods in enemy vessels were subject to capture and that the Declaration was adopted to mitigate this practice. (*Supra* pp. 359-360.) This is believed to be incorrect. The third article of the Declaration of Paris was simply declaratory of a rule of international law dating from the Middle Ages, and the only exceptions which existed were in the case of specific treaties declaring "enemy ships, enemy goods" as an offset to the concession of "free ships, free goods." See *Consolato del Mare*, Chap. 273, H. Wheaton, *History of the Law of Nations in Europe and America*, New York, 1845, p. 63; Report of British Commissioners on the Silesian Loan, 1753, Moore, 7: 603; T. J. Lawrence, *The Principles of International Law*, 4th ed., New York, 1910, sec. 242, p. 657.

EDITORIAL COMMENT

THE CESSATION OF DIPLOMATIC RELATIONS WITH GERMANY

Since February 4, 1915, when the Imperial German Admiralty proclaimed a "war zone" around the British Isles and declared its purpose to sink on sight, without warning, and without regard to the fate of the passengers or crew, any enemy merchant vessel found in that area, warning neutrals of the danger they would incur of being sunk without warning in those waters, there has been a serious diplomatic controversy between the United States and the Imperial German Government.

The illegality of this proceeding on the part of the Imperial Government is too clear to require extended discussion. The arbitrary designation and demarcation of such a "war zone" by a belligerent Power are not justified by the laws and conditions of effective blockade; for it cannot be pretended that a blockade is effective through which by far the major part of the vessels passing in and out of the alleged "war zone" are not, in fact, actually captured. But the chief offense to neutrals in this proclamation was not the arbitrary limitation of a prohibited area on the high seas. It was the assumption of a right to sink without warning, or any of the legally prescribed formalities of detention and search, any vessel found within this area. This declaration involved a menace of twofold consequence, for it exposed to destruction (1) the lives of neutral innocent noncombatants, and (2) neutral vessels with their passengers and crews. These restrictions upon the freedom of the sea were, from all points of view, so clearly in conflict with established neutral rights as to be intolerable. The Government of the United States, therefore, on February 10, 1915, expressed its urgent protest against the German declaration, and issued its now celebrated note regarding "strict accountability," in case of the sinking of an American vessel or the destruction of American lives as a consequence of the orders of the Imperial German Admiralty.

The reason for this disregard of the legal requirements concerning detention and search, and of provision for safety of passengers and crew,

in case of the destruction of a vessel, was the inability of a new instrument of naval warfare to effect its purpose without exposing itself to danger if it were held to comply with existing legal requirements. This instrument was the submarine torpedo boat, the only sea craft which the Imperial German Government was in a position to employ for the purpose of preventing commerce with Great Britain. The question at issue was, in effect, whether the naval exigencies of the Imperial Government were to be permitted to make an end of neutral rights and the established laws of the sea by employing an instrument of destruction that could not comply with them without risk to itself, yet was able by a secret blow to sink a ship and destroy the lives of innocent travelers and noncombatant crews.

The Imperial Government took the ground that the use of the submarine was essential to the accomplishment of its purpose. The Government of the United States held that noncombatant vessels could not be legally sunk without warning, and that provision must be made for the safety of passengers. Thus, from the beginning of the controversy in February, 1915, it has been evident that the Imperial Government must either conform to these requirements of established law or that the friendship between the United States and Germany could not continue. From that time forward, without waiting for the deplorable events that subsequently occurred, the Government of the United States would have been fully justified in presenting the alternative of an immediate abandonment of its policy by the Imperial Government or the cessation of diplomatic relations. The necessity for a choice was bound up in the opposing attitudes of the two governments and an immediate decision might properly have been at once insisted upon.

The patience of the Government of the United States in dealing with the Imperial Government is unexampled. The sinking of the *Lusitania*, on May 7, 1915, involving the loss of 1153 lives, among them 114 American men, women, and children, justified immediate action by the Government of the United States, which would have obtained the united support of the American people. Since that outrage was perpetrated many more American lives had been destroyed, when the sinking of the *Sussex*, on March 24, 1916, brought public indignation in the United States to a point that absolutely necessitated action.¹

¹ See editorial entitled The Correspondence Regarding the S.S. *Sussex*, in this JOURNAL, Vol. 10, No. 3, July, 1916, pp. 556-560.

On April 18th the Secretary of State said:

Unless the Imperial Government should now immediately declare and effect an abandonment of its present methods of submarine warfare against passengers and freight-carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Empire altogether.

The effect of this note was to call forth a *réponse de transaction*, under date of May 4th. Although the German Ambassador at Washington had stoutly declined by instruction of his government to admit that the sinking of the *Lusitania*, a settlement for which was then under discussion, was "illegal," the Imperial Government now practically conceded that the sinking of merchant ships without warning and the destruction of the lives of noncombatants were in violation of international law, and could be defended only on the ground of reprisal against a belligerent; a defense that wholly ignored the rights of neutrals. With evident reluctance, accompanied with the expressions of sentiments of unfriendliness toward the United States because of its exportation of arms and munitions, the Imperial Government did, however, agree thenceforth to conform its conduct to the requirements of international law; but, with a view to inducing the Government of the United States to place restraints upon the conduct of Great Britain, reserved "complete liberty of decision" in case the United States should not succeed in obtaining the desired concessions from that Power. To this the Secretary of State replied, in effect, that the Government of the United States could not entertain the idea of purchasing Germany's compliance with international law by negotiation with another Government.

As was pointed out in this JOURNAL in the concluding comment on the *Sussex* correspondence, the interchange of views during April and May, 1916, did not, therefore, result in a final solution of the controversy. The conduct of the Imperial Government for a time, however, seemed to indicate a triumph of American diplomacy, but the attitude of both Governments remained substantially unchanged.

The negotiations regarding the *Sussex* incident, had, however, resulted in an ultimatum on the subject of submarine warfare. The Government of the United States had firmly and irrevocably expressed its determination to sever diplomatic relations with Germany altogether, in case the practice complained of was not abandoned. The counsels of the Imperial Government, while temporarily leaning toward

the total abandonment of the sinking of merchant vessels without warning and the merciless destruction of noncombatants, as international law demanded, appear, in fact, to have been divided. The sinking of ships by submarines continued, but it was practiced for a time with a certain degree of restraint.

On January 31, 1917, the German Ambassador presented to the Department of State at Washington a memorandum reading as follows:

From February 1, 1917, all sea traffic will be stopped with every available weapon and without further notice in the following blockaded zones around Great Britain, France, Italy and in the Eastern Mediterranean.

(Then follows the circumscription of the zones.)

Neutral ships navigating these blockade zones do so at their own risk.

Provision is made that "neutral ships which are on their way toward ports of the blockaded zones on February 1, 1917, and have come within the vicinity of these zones, will be spared during a sufficiently long period;" but, if they have not reached these zones, they are warned to return. Then follows an edict which is, without doubt, the most dictatorial attempt to lay down the rule of the sea and the conditions upon which neutral nations may make use of it ever communicated by one government to another:

Sailing of regular American passenger steamers may continue undisturbed after February 1, 1917, if

- (a) the port of destination is Falmouth;
- (b) sailing to or coming from that port course is taken via the Scilly Islands and a point 50 degrees north 20 degrees west;
- (c) the steamers are marked in the following way which must not be allowed to other vessels in American ports: On ships' hull and superstructure 3 vertical stripes 1 meter wide each to be painted alternately white and red, and the stern the American national flag.

Care should be taken that, during dark, national flag and painted marks are easily recognizable from a distance and that the boats are well lighted throughout.

- (d) one steamer a week sails in each direction with arrival at Falmouth on Sunday and departure from Falmouth on Wednesday;
- (e) the United States Government guarantees that no contraband (according to German contraband list) is carried by those steamers.

Comment upon these extraordinary decrees is superfluous. They read like regulations for vessels sailing in German territorial waters. They prescribe not only the one port of destination to which American vessels may go, but the route to be followed, the precise dimensions

and colors of the zebra-like stripes with which they must be decorated, and even the days of arrival and departure as well as the number of sailings.

To this memorandum there was only one possible answer. On February 3 the Secretary of State addressed a note to the German Ambassador recalling the correspondence concerning the *Sussex* and concluding in the following language:

In view of this declaration (that all ships met within the zones will be sunk), which withdraws suddenly and without prior intimation the solemn assurance given in the Imperial Government's note of May 4, 1916, this Government has no alternative consistent with the dignity and honor of the United States but to take the course which it explicitly announced in its note of April 18, 1916, it would take in the event that the Imperial Government did not declare and effect an abandonment of the methods of submarine warfare then employed and to which the Imperial Government now purpose again to resort.

The President has, therefore, directed me to announce to Your Excellency that all diplomatic relations between the United States and the German Empire are severed, and that the American ambassador at Berlin will be immediately withdrawn and in accordance with such announcement to deliver to Your Excellency your passports.

Thus officially terminated a relation of friendship which had long been sincerely cherished, and which the Government of the United States, with unprecedented forbearance, had striven to maintain. Serious as such a step is, it is approved and sustained by the unanimous opinion of loyal American citizens. It had been provoked by an attitude of indifference to the claims of friendship and the rights of humanity that invalidated all professions of amity, and subsequent revelations of the spirit and designs of the Imperial German Government regarding the territorial integrity of the United States confirm the decision that further intercourse with the Imperial German Government was derogatory to the honor and dignity of the United States.

DAVID J. HILL.

LIMITED USE OF FORCE

The Special Session Message of President Adams of May 16, 1797, at the time of strained relations between the United States and France, offers suggestive material for comparison with conditions at present confronting the United States. President Adams said:

The diplomatic intercourse between the United States and France being at present suspended, the Government has no means of obtaining official information from that country. . . . Hitherto I have thought proper to prevent the sailing of armed vessels except on voyages to the East Indies, where general usage and the danger from pirates appeared to render the permission proper. Yet the restriction has originated solely from a wish to prevent collisions with the powers at war, contravening the act of Congress of June, 1794, and not from any doubt entertained by me of the policy and propriety of permitting our vessels to employ means of defence while engaged in a lawful foreign commerce. It remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them from committing acts of hostility against the powers at war. In addition to this voluntary provision for defense by individual citizens, it appears to me necessary to equip the frigates, and provide other vessels of inferior force, to take under convoy such merchant vessels as shall remain unarmed. . . .

However we may consider ourselves, the maritime and commercial powers of the world will consider the United States of America as forming a weight in that balance of power in Europe which never can be forgotten or neglected. It would not only be against our interest, but it would be doing wrong to one half of Europe, at least, if we should voluntarily throw ourselves into either scale. It is a natural policy for a nation that studies to be neutral to consult with other nations engaged in the same studies and pursuits.

Attorney General Lee, in August, 1798, maintained that there was with France "not only an actual war" but "a maritime war authorized by both nations." In Congress there was not lacking at that time the opinion that there was a state of war between the United States and France. When Congress enacted various measures for defense, Edward Livingston, later to be Secretary of State and Minister to France, said: "Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case."

Later, in 1830, his views had changed, and he saw in these earlier events that: "This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences."

The Acts passed aimed, like that of May 28, 1798 (1 Stat. L, 561), "more effectually to protect the commerce and coasts of the United States." Here the President is authorized not to declare war, but to use force because depredation had been committed upon American commerce in contravention of the law of nations. This Act authorized in accord with international law the bringing in for action of vessels which "shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing dep-

redations on the vessels belonging to citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel." This was distinctly an act to protect the commerce and coasts of the United States.

The Act of June 25, 1798 (1 Stat. L. 572) provided that an American merchant vessel "may oppose and defend itself against any search, restraint, or seizure which shall be attempted upon such vessel." This Act was aimed against attempts by French vessels upon American vessels.

In the case of the *Nancy* (27 Ct. Cl. R. 99) it was said:

It has been urged that the Statutes of the United States authorize resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single State can change the law of nations by its municipal regulations.

This opinion was sustained in 1900 in the case of the *Rose* (36 Ct. Cl. R. 291), where it was said:

If, therefore, at the time of this seizure there was any conflict between the municipal law of the United States, as exemplified in the statute, and the well-recognized principle of international law, the latter must prevail in the determination of the rights of the parties.

The *Rose*, after resistance and capture, had been condemned under French law. Chancellor Kent had said:

There may be cases in which the master of a neutral ship may be authorized by the natural right of self-preservation to defend himself against extreme violence threatened by a cruiser grossly abusing his commission; but except in extreme cases a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation and search or be carried into a proximate court for inquiry.

In the case of the *Rose* it was argued

That the condition existing between the two governments and peoples was such that all respect of neutral right had ceased, and that force, fraud, and violence prevailed, and in that connection much is said as to the right of self-defence.

The court, however, stated

The claimants are treading on very dangerous ground when they urge the higher law of self-preservation. Self-defence is founded on the theory that it is the only remedy, and that, being the only remedy, it presupposes the absence of all law protecting the rights of him who asserts the prerogative of self-defence. If the right of self-defence prevailed to the extent of repelling force by force, and was incident

to the crew of the ship captured, then all other law was silent and war prevailed, which condition would be most disastrous to the case of the claimant.

It was decided that the *Rose* was not entitled to take the law into its own hands and use force and that the seizure in 1799 and condemnation by the French authorities was lawful.

The Act of July 9, 1798 (1 Stat. L. 578), authorized the President "to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel." The same Act authorized the commissioning of private vessels for a similar purpose.

The Act of July 7, 1798, had declared treaties between the United States and France at an end because "there is yet pursued against the United States, a system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation."

There was no declaration of war, but there were acts which might properly be regarded as just cause for war. These acts were acts of reprisal against a specified state, sometimes called a condition of limited use of force.

The use of force has been authorized at other times by Congress, as in the *Water Witch* affair in 1858, and in the controversy with Venezuela in 1890.

In all cases where force is thus used by state against state it should be borne in mind that, as said by the Court of Claims in 1909, "while reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them." (The Schooner *Endeavor*, 44 Ct. Cl. 242.)

GEORGE G. WILSON.

SANCTION FOR INTERNATIONAL AGREEMENTS

Whether or not justified, the lack of confidence in international agreements seems in some quarters to have become more general in recent years. Diplomatic agents, and those particularly concerned with international relations, seem, however, to have no illusions. In ancient times, and often in modern times, Deity has been called upon to witness agreements between tribal or political unities. In early Grecian tribal agreements, a money penalty was provided if either party failed in its obligations, and the penalty was to go as a tribute to the Olympian Zeus. Hostages were early given, and many other

attempts to secure observance of agreements through extraneous pledges may be found. A mediæval treaty makes the parties swear to its observance "by the name of God Almighty, by the Invisible Trinity, by all Divine things, and by the last Day of Judgment." While hostages have not been given for more than a century and a half, the call upon Deity has remained common. Even the Treaty of Paris of 1856 contains the well-worn formula "in the name of Almighty God." The treaty of 1848 between the United States and Mexico, which in Article 21 provides for arbitration in case of disagreement with respect to interpretation of the treaty itself "or with respect to any other particular concerning the political or the commercial relations of the two nations," also opens with the formula "in the name of Almighty God."

A distinguished English publicist in 1867, on reviewing the field of treaty agreement, wrote that "these varied and redoubled promises rested on nothing at all but the good faith they were meant to fortify, and that a penalty which is nugatory, or a pledge which can be circumvented, is not only ineffective, but worse, because it lends a treacherous satisfaction to the conscience, suggests the very subtleties that elude it, and assists the easy work of self-deception." Even if this opinion is too pessimistic it certainly was not based on lack of comprehensive knowledge and wide experience. An eminent German jurist has recently said, "Good faith and mutual confidence are the highest sanction of civil law; it is not so in international law." Other students of world affairs have in recent years felt the need of effective sanctions for treaty agreements. Such sanctions are especially needed at a time when it would be more advantageous for one of the parties to disregard rather than to keep its contractual agreement.

Some recent conventions, such as the Hague Convention of 1907, relative to the Opening of Hostility, provide for penalties. The above convention provides that, as to third parties who would become neutral, the existence of a state of war "shall not take effect in regard to them until after the receipt of a notification." The penalty for failure to make the state of war properly known is to this extent automatic. The Convention of 1907 respecting the Laws and Customs of War on Land, unlike the corresponding convention of 1899, contained a provision that "a belligerent party which violates the provisions of said regulations shall, if the case demands, be liable to pay compensation." Thus there was introduced a penal sanction for violation of the rules.

Discussions such as those of the men experienced in practical poli-

tics, members of the Interparliamentary Union, show a growing feeling that agreements between states, however formally made, are not in themselves sufficient sureties for state conduct. If treaties are to be made under the proviso *rebus sic stantibus*, there is little to assure observance unless in the treaty itself there be some assurance that the question whether conditions remain the same shall be determined equitably and not by the opinion of one party only. There is demanded some international surety that treaties shall not be disregarded at the pleasure of one of the parties without consideration of the rights or supposed rights of the other. Various organizations, such as the League to Enforce Peace, the Central Organization for a Durable Peace, certain of the proposed organizations of neutral states, and other suggested unions, have as a part of their purpose to put a physical or other effective sanction behind international agreements.

There may be just ground for difference of opinion as to the best method by which the observance of treaty agreements may be made more certain. There seems, however, to be little difference of opinion in regard to the question that they should be made more secure. Certain persons claim that many existing treaties are worse than useless and that their provisions should therefore be disregarded. Doubtless there are many such treaties, but the admission of this fact does not imply that one of the parties may legally act in disregard of its treaty obligation. Certainly some method should be found to make it at least inexpedient for a state deliberately to break a treaty contract which it has assumed and upon the fulfilment of which the other parties are relying. It does not require searching investigation of the speeches and writings of those entrusted with the direction of state affairs, to find evidence that simple treaty obligations are not always by them held as prohibiting action in opposition to the treaty if such action would be decidedly for the supposed advantage or interests of the state which they serve.

It is also true that all states do not take the same attitude toward obligations embodied in treaty stipulations. Some states regard such obligations as strictly binding until the treaty is denounced; others have regarded treaties as convenient statements of present policy while some rulers have even gone so far as to declare they were not bound by acts of their predecessors.

The foreign offices of all the leading European states have, since 1914, made clear their desire for an effective sanction for international

agreements, and have further indicated that this sanction is not to be found in mere words. This has in a realistic way been demonstrated by Switzerland, which, in its own official statement is "situated on an island amidst the seething waves of the terrible world war," and is compelled "to maintain and defend, by all the means at its disposal its neutrality and the inviolability of its territory as recognized by the Treaties of 1815." If a treaty between two states is only as strong as the forces of the states, the value of the treaty in an extreme trial is questionable. It now seems to be the time, according to the pronouncements of both belligerent parties, to devise sanctions of whatever kind they may be, which shall be neither illusory nor impracticable.

GEORGE G. WILSON.

PROJECTS SUBMITTED TO THE AMERICAN INSTITUTE OF
INTERNATIONAL LAW

Of special interest to the readers of the JOURNAL is the *Rapport Questionnaire et Projets* which has been prepared for the American Institute of International Law by the distinguished Secretary-General of the Institute, Alejandro Alvarez. The *Report* is the result of five years of study and the synthesis of several prior publications, viz., *The Codification of International Law*, Paris, 1912; *The Great European War and the Neutrality of Chile*, Paris, 1915; and *The Future of International Law*, Washington, 1916.

The central task which the Institute has set for itself is the noble and all-important one of assisting in the creation of an organization which shall assure for the society of states a permanent peace. This work was inaugurated in December, 1915, when the Institute, upon the motion of its President, Hon. James Brown Scott, adopted a "Declaration of the Rights and Duties of Nations" intended to serve as a basis for the reconstitution of international law. There are those who contend that such a "Declaration" is mere verbiage or abstraction. This criticism might be justified if the Declaration were regarded as consisting of absolute, inherent, eternal, primordial Laws of Nature; but we can hardly conceive of any rational objection to a statement of fundamental principles which may serve as a basis or guide for structural organization and international regulation.

The coming session of the Institute will apparently be devoted to a study and discussion of the various plans which have been submitted

by the various American societies of international law, for the future organization of the world on a pacific basis, "in such wise, that when the Great War shall have ended, the different governments will have at their disposition a work as complete as a possible, which will clearly express the wishes of all America in respect to the future international organization" (p. 3 of the *Report*).¹

Admitting the complexity of the problem, Señor Alvarez finds that the main obstacle to a durable peace is a nationalism which is too narrow and exclusive. Consequently, in the international organization of the future, it will be necessary:

(1) To extirpate this narrow and exclusive patriotism, or at least to attenuate or complete it by encouraging a sentiment more in harmony with the interdependence of states;

(2) To eliminate, or at least to reduce, the causes of rivalry between states;

(3) To subordinate all relations between states to juridical rules in such a manner as to exclude "policy" as much as possible;

(4) and (5) To provide bases upon which must rest the international law of the future and international law upon the American continent.

As means of modifying chauvanism or excess of national sentiment, Señor Alvarez suggests education, limitation of armaments, the establishment of national institutions, better international organization, etc.

The causes of rivalry between states may be divided into two great categories — moral or psychological and economic. Among the former may be mentioned the primordial factor of a too narrow nationalism, race hatred, desire for revenge, the longing for liberty or independence, etc. "The causes of rivalries of an economic order are derived from an increase of population, the development of commerce and industry, leading to imperialistic policies characterized by a desire to acquire colonies, to extend trade to certain zones or to dominate there (rivalries for markets), the wish to have an easy access to certain regions, etc." (p. 12).

As solutions for these problems are suggested:

(a) Centralization and development of international administrative services or unions into one Administrative Union.

¹ The report was submitted to the meeting of the Institute held in Havana in January last. The Institute expressed neither approval nor disapproval of the project, but referred it for an expression of opinion to the national societies of international law for examination and report. The Institute decided that the project would not be considered until after the war. — J. B. S.

(b) The formation of an Economic and Commercial Union.

(c) The creation of an international legislative organ or Legislative Union which shall organize and centralize the various international conferences which meet constantly. For example, a permanent committee to prepare programs, secure ratifications, etc., might be instituted.

(d) The creation of an international judicial organ or Permanent Court of International Justice to apply the law to particular cases as also to interpret and develop the rules of international law if these are obscure or incomplete.

(e) If possible, the creation of an executive organ, whether in the form of an Executive Council or Committee of International Conciliation. This Council or Committee should attempt to insure international order without having recourse to arms, force being used, if at all, only in case of extreme necessity. For the sanction of the new world order the principal reliance is placed upon moral suasion or a public opinion which should be the main guarantee of international order. It seems that the American Institute of International Law is opposed to the League to Enforce Peace idea as championed by Ex-President Taft and many other eminent Americans.

It appears that the American Institute is looking forward to a new conception of international law which shall bear the following characteristics:

(a) The law of warfare which will consist mainly of the rights and obligations of neutrality, should be relegated to a secondary role. In any case, the rights of neutrals must no longer be subordinated to those of belligerents.

(b) The new international law must emphasize the conceptions of duty, solidarity, and the general interest.

(c) International law must rest upon the fundamental rights of states.

(d) Not all international regulations are of universal application. There are rules which are only applicable to particular nations, or to a particular region or Continent.

(e) The domain of international law should be extended not merely to the relations of states between themselves, but to such international entities as international associations, as also to other matters of an international character, such as the rights of individuals.

(f) International law should constitute a part of the legislation of each state in the sense that it shall be respected by the legislative power and applied by the national tribunals. Consequently, a state

should be responsible in damages for violations of international law, whether resulting from national laws or judicial decision.

Attached to the *Report* are the following schemes which serve as sections of a projected code of international law: on "The Foundation to form Basis of the International Law of the Future," on "The Fundamental Rights of the American Continent," and on "Maritime Fundamental Time and space forbid an adequate or detailed treatment of the Neutrality."

Suggestions contained in the *Report* to the American criticism of the suggestion by Señor Alvarez. We have therefore confined our Institute submitted a pleasanter task of exposition. However, it has confined ourselves mainly to the offer a few words of adverse criticism. It may not be out of place to offer extremely suggestive and even fruitful. Some of the ideas we consider value; while a few appear to be of doubtful value; others seem to be of doubtful value.

Señor Alvarez is probably even either impracticable or undesirable. exclusive nationalism or patriotism is the main cause of modern war. Nationality seems to be the main cause of modern war. that is both good and evil the modern religion — the source of so much this primordial factor. But in attempting to extirpate or attenuate injure the good along with the evil; great care should be taken not to uproot or to

The causes of war are much deeper and more varied and complex than the authors of this *Report* seems to realize. How can we hope to eradicate this gigantic evil by any system of international law or of mere international regulation? How, for example, can we hope ever to extend the domain of law so as to include all matters of public policy; or how can we reasonably expect to provide a system of law which shall control or regulate all matters of international trade or effectively prevent the exploitation of weaker or backward peoples, thus eliminating national commercial rivalries — the prolific cause of so many modern wars. How solve the various Balkan riddles, the Mexican question, the American-Japanese problem; or secure American interests in the Caribbean by any of the formulas contained in this *Report*? It might well to create an International Administrative Union, an Economic and Commercial Union, a Legislative Union, etc., but how far would they go toward the solution of these and other vital questions of national and international policy?

We might inquire how much attention Powers like Germany, Russia, and even the British Empire and the United States would be likely to pay to a Committee of International Conciliation which relied upon moral suasion or an international public opinion (which does not as yet

exist) to execute its decrees unless these orders were believed to be in harmony with the vital national interests of these great empires.

The elaboration of a particular American International Law we believe to be both Utopian and undesirable. The spiritual and material interests of North America are much more closely bound up with Europe than with South America, and this is likely to be even more the case in the future than in the past. The dream of an even partially isolated America is forever gone, and even if the Monroe Doctrine be extended (which will almost certainly be the case), this need not prevent a much closer interrelation between Europe and America than has hitherto existed.

In unduly emphasizing the rights and obligations of neutrality, we are convinced that Señor Alvarez and his associates are looking backward rather than forward. In a world of ever increasing international solidarity and interdependence, the obligations of non-intervention and neutrality must tend more and more to disappear. In a future world war the role of the neutral must needs be mainly confined to the weaker and smaller states who, by reason of their weakness or lack of vital interest in the conflict, may prefer to hold themselves aloof from the struggle as far as possible. As our former great champion of neutrality, President Wilson, remarked in an address at Cincinnati on October 26, 1916:

This is the last war of the kind or of any kind that involves the world that the United States can keep out of. I say this because I believe the business of neutrality is over; not because I want it to be over, but I mean this, that war now has such a scale that the position of neutrals sooner or later becomes intolerable.

AMOS S. HERSHBY.

THE ARMED OCCUPATION OF SANTO DOMINGO

The Dominican Republic has been "in a state of military occupation" by the armed forces of the United States since the twenty-ninth of November, 1916. The purpose of this military occupation was stated by Captain Knapp, of the U.S.S. *Olympia*, in his proclamation¹ of that date, as follows:

This military occupation is undertaken with no immediate or ulterior object of destroying the sovereignty of the Republic of Santo Domingo, but, on the contrary, is designed to give aid to that country in returning to a condition of internal order

¹ Printed in the Supplement to this JOURNAL, p. 94.

that will enable it to observe the terms of the treaty aforesaid (1907), and the obligations resting upon it as one of the family of nations.

The specific basis for this intervention is found in Article III of the treaty of 1907 between Santo Domingo and the United States.²

Until the Dominican Republic has paid the whole amount of the bonds of the debt, its public debt shall not be increased except by previous agreement between the Dominican Government and the United States. A like agreement shall be necessary to modify the import duties, it being an indispensable condition for the modification of such duties that the Dominican Executive demonstrate and that the President of the United States recognize that, on the basis of exportations and importations of the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would at such altered rates of duties have been for each of such two years in excess of the sum of \$2,000,000, United States gold.

The proclamation goes on to say that: "The Government of Santo Domingo has violated said Article III on more than one occasion; and . . . the government of Santo Domingo has from time to time explained such violations by the necessity of incurring expenses incident to the repression of revolution." The exact nature of these violations has not been officially disclosed, but it would not seem open to controversy that, in spite of the hopes of the negotiators of the 1907 Convention, the finances of Santo Domingo had long been badly administered. It has been asserted that eighty percent of the revenues of the Republic had been required for salaries alone. A situation which would admit of seven Presidents since 1911 would certainly appear to be one demanding drastic measures. It had become evident that the treaty of 1907 had not provided adequate safeguards for the rights of foreign creditors, and as a consequence, of the sovereign interests of Santo Domingo, menaced by the claims of these creditors.

The immediate occasion for American intervention was the revolution against President Jimenez in May, 1916. The operations of the rebels became such a menace to American and foreign interests that United States marines were landed on May 16th, and the capital of the Republic was occupied. The presence of British and French warships was an added complication. This was removed by the arrival of Admiral Caperton, who was of higher rank than the commanding officers of these warships. Admiral Caperton and Minister Russell endeavored to obtain free elections for the presidency, and a complete

² Printed in the Supplement to this JOURNAL for 1907 (Vol. 1), p. 231.

cessation of fighting. The rebels continued to fight on, and attacked the United States Marine Camp at Monte Cristo on June 6th. This condition of affairs became so intolerable that it finally became necessary to place the Republic under military occupation. Since November 29th of last year the ordinary administration of justice and the laws of the Republic has been carried on through duly authorized Dominican officials, "all under the oversight and control of the United States forces exercising military government."

It may be pertinent to ask what is the precise nature of this military government, and from whence are its powers derived. Captain Knapp declared in his proclamation that: "acting under the authority and direction of the Government of the United States . . . the Republic of Santo Domingo is hereby placed in a state of military occupation by the forces under my command, and is made subject to military government and to the exercise of military law applicable to such occupation." It is evident that this military government could not aim at the subversion of the sovereignty of Santo Domingo. The United States exercises an "oversight and control" and acts only in behalf of Dominican sovereignty. It is merely a trustee for the time being to meet an extraordinary emergency.

From the point of view of American law, or international procedure, however, it is not quite clear what is meant by "military law" or what is the source of the power exercised by this military government. Military law of course strictly denotes the law which governs the conduct of military persons. It does not apply to civilians. Martial law, on the other hand, has come to be regarded from the strictly American point of view as set forth in *Ex Parte Milligan* (4 Wall., p. 2) as applying only in times of special emergency within the territorial jurisdiction of the United States. In that case it was stated: "If, in foreign invasion or civil war, . . . on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."

The "military law" applied in Santo Domingo is therefore the law of military occupation. It is not martial law in the strict interpretation of that term. It is the law of military government. This distinction has been clearly brought out by Magoon in his book *The Law of Civil Government under Military Occupation* (p. 12):

It will be seen that a military government takes the place of a suspended or destroyed sovereignty, while martial law or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty.

The next question that arises is: "Does this military government administer the law of war relating to military occupation?" Is it necessary, in other words, to have an actual or an implied state of war in order to warrant the institution of military government? In the case of Santo Domingo there has been no avowed hostile occupation. There have been clashes between individual Santo Dominicans and United States forces, but there has been no recognition of a state of war. Moreover, the American officials have scrupulously endeavored to respect the laws of the Republic. The "military occupation" has been restricted to "oversight and control."

We would seem to be in the presence of a most anomalous situation. It is possible to predicate an implied state of war in Santo Domingo, arising out of forceful opposition to the United States in its efforts to protect American and foreign interests in accordance with the treaty of 1907. The law of military occupation in accordance with the laws of war will then have full sway. It is also possible to predicate an armed intervention for a limited purpose, which expressly disavows any intent to impose the law of military occupation as prescribed by the laws of war. The latter hypothesis is in closer accord with the nature of American intervention in Santo Domingo. The armed occupation of that republic is not hostile. The laws of war do not apply. The purpose of the military government is friendly. The law it applies, therefore, is whatever the President of the United States as commander-in-chief of the army and navy may consider to be required by the emergency. That the President possesses such extraordinary powers would seem to have been fully proven in various decisions of the Supreme Court, notably that of *In re Neagle* (135 U.S., 1). The justification of the extraordinary use of such power as in the case of the armed occupation of Santo Domingo is an entirely different question.

The Department of State has not indicated as yet the future policy of the United States in Santo Domingo. In the meantime the military occupation will doubtless continue until the people of that country show their ability to establish a government able to fulfill its treaty engagements, and to observe "the obligations resting upon it as one of the family of nations," to quote the words of the proclamation.

As to the first condition, it should be apparent that a new treaty between Santo Domingo and the United States will be required to afford adequate guarantees for the protection of foreign creditors, as well as to safeguard the rights of the Dominican Republic. The natural model to follow will be the treaty between Haiti and the United States, of September 16, 1915.³ This convention provides, in addition to an American receivership of customs, for a financial advisor possessing very extensive powers to be nominated by the United States, and for a native constabulary under American officers. It also guards against the cession of territory by Haiti to any foreign government, or the impairment of its independence. It would seem likely that the United States will be compelled to insist on similar guarantees on the part of Santo Domingo before the armed occupation may safely be terminated.

In regard to the broad question of intervention, most of the writers on international law are agreed in laying down the positive duty of non-intervention by one nation in the affairs of another. It is clear that the claims of nations to independence, equality, and sovereignty preclude any intrusion in each other's domestic affairs. Nevertheless most of these publicists are compelled to concede that there may be justifiable causes for intervention in exceptional cases. This is particularly evident where there is a collective mandate by several Powers, or where a nation reserves by treaty the right of intervention under certain conditions, as in the case of the United States and Cuba. As a matter of fact it would seem clear that if there were no right of intervention, either gross wrongs would be committed by some nations subject to no restraints, or certain countries would relapse into barbarism. Under such conditions, in the absence of an international police, or a special mandate, a nation is bound to intervene in the affairs of another. Intervention, therefore, in the defence of specific rights or the general interests of international society thus becomes legally justifiable. Whether it be characterized as an abatement of an international nuisance, as a measure of self-defence, or as a service to mankind, intervention in many instances may properly be classified as a legal measure of self-redress. It is not merely a matter of policy, as some writers would hold.

The original intervention of the United States in Santo Domingo in 1907 to aid in the restoration of its finances and the defence of its very existence was justified as a logical extension of the Monroe Doctrine. It resulted in the protection of the rights of the foreign creditors and of

³ See editorial in this JOURNAL for October, 1916 (Vol. 10), p. 859.

the Dominican Republic as well. Apart from the Monroe Doctrine, this intervention was likewise dictated by the necessity of protecting purely American interests. The present armed occupation is justified technically by the duty of enforcing the terms of the convention of 1907. From every point of view, therefore, the action of the United States, in both Haiti and Santo Domingo, would seem to be in accord with its duties as a responsible member of the family of nations, and particularly with its obligations as an elder brother of these less fortunate republics. There is nothing illegal or reprehensible in intervention of this character in the defence of special rights and the general interests of international law and order.

PHILIP MARSHALL BROWN.

MEXICO AND THE UNITED STATES

On October 19, 1915, the United States Government recognized the *de facto* government in Mexico presided over by General Carranza. In a report to the President, rendered on February 12, 1916, upon the ability of that government to fulfill its promises and obligations to protect American rights and property undertaken before recognition was extended, Secretary of State Lansing expressed the opinion that "the lawless conditions which have long continued throughout a large part of the territory of Mexico are not easy to remedy and that a great number of bandits who have infested certain districts and devastated property in such territory cannot be suppressed immediately, but that their suppression will require some time for its accomplishment, pending which it may be expected that they will commit sporadic outrages upon lives and property."¹

Less than a month after this statement was made, namely, on March 9, 1916, the territory of the United States was invaded by a force under the command of Francisco Villa, which attacked the city of Columbus, New Mexico, killed a number of Americans, and set fire to many buildings. As soon as a sufficient force of American troops could be collected, they pursued Villa's band of raiders across the international boundary line and established themselves at certain points in northern Mexico.²

In a public announcement issued on March 25, 1916, President Wilson stated that "the expedition into Mexico was ordered under an agree-

¹ This JOURNAL, April, 1916 (Volume 10), p. 366.

² This JOURNAL for April, 1916 (Volume 10), p. 337.

ment with the *de facto* government of Mexico for the single purpose of taking the bandit Villa, whose forces had actually invaded the territory of the United States, and is in no sense intended as an invasion of that republic or as an infringement of its sovereignty." He stated further that

The expedition is simply a necessary punitive measure, aimed solely at the elimination of the marauders who raided Columbus and who infest an unprotected district near the border which they use as a base in making attacks upon the lives and property of our citizens within our own territory. It is the purpose of our commanders to cooperate in every possible way with the forces of General Carranza in removing this cause of irritation to both governments and to retire from Mexican territory so soon as that object is accomplished.³

In support of the President's action the United States Senate had, on March 17, 1916, adopted the following resolutions:

Whereas it is understood that the President has ordered or is about to order the armed forces of the United States to cross the international boundary line between this country and Mexico for the pursuit and punishment of the band of outlaws who committed outrages on American soil at Columbus, New Mexico; and

Whereas the President has obtained the consent of the *de facto* government of Mexico for this punitive expedition; and

Whereas the President has given assurance to the *de facto* government that the use of this armed force shall be for the sole purpose of apprehending and punishing said lawless band, and that the military operations now in contemplation will be scrupulously confined to the object already announced, and that in no circumstance will they be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind: Therefore be it

Resolved by the Senate (the House of Representatives concurring), That the use of the armed forces of the United States for the sole purpose of apprehending and punishing the lawless band of armed men who entered the United States from Mexico on the 9th day of March, 1916, committed outrages on American soil, and fled into Mexico, is hereby approved; and that the Congress also extends its assurance to the *de facto* government of Mexico and to the Mexican people that the pursuit of said lawless band of armed men across the international boundary line into Mexico is for the single purpose of arresting and punishing the fugitive band of outlaws; that the Congress in approving the use of the armed forces of the United States for the purposes announced joins with the President in declaring that such military expedition shall not be permitted to encroach in any degree upon the sovereignty of Mexico or to interfere in any manner with the domestic affairs of the Mexican people.⁴

The entry of American troops into Mexico was not regarded kindly by the Mexicans, and obstacles to the operations of the American forces

³ Supplement to this JOURNAL for July, 1916 (Volume 10), p. 191.

⁴ Congressional Record, March 17, 1916, Volume 53, p. 4274.

were promptly placed in their way. At Parral, where it was believed the American forces were on the point of capturing Villa, they were, while passing through the town, attacked by the inhabitants, and, in order to prevent bloodshed, they withdrew. In the meantime a lengthy correspondence ensued between General Carranza and the State Department regarding the agreement under which the United States asserted its forces had entered Mexico. General Carranza denied the existence of such an agreement and impugned generally the good faith of the United States in its dealings with Mexico. The relations between the two countries became severely strained and reached the breaking point on May 22, 1916, when General Carranza denounced the American punitive expedition "as an invasion without Mexico's consent, without its knowledge, and without the coöperation of its authorities," and demanded its immediate withdrawal under threat of an appeal to arms in case of a refusal to comply.

The United States replied to General Carranza on June 20, 1916, in which it reviewed the altruistic attitude of the American Government toward Mexico during the trying years of its series of revolutions beginning with the overthrow of General Diaz, vigorously defended its action in protecting its border by patrolling a portion of Mexico in which Carranza was obviously unable to exert any semblance of authority, and firmly declined to entertain his request for the withdrawal of the troops until he gave evidence of some ability to fulfill his international obligations to his neighbor on the north.

On the day following the despatch of this note a battle occurred between American and Mexican forces at Carrizal in consequence of orders which had been issued by Carranza to his army not to permit movements of American troops except back towards the border. This occurrence made it evident that, unless either country showed a disposition to yield, war would inevitably occur. The tension was relieved on July 4, 1916, when Carranza suggested mediation by Latin-American Governments. The United States answered on July 7, offering to exchange views with Carranza as to a practicable plan for settlement.

In pursuance of this exchange of notes, a series of conferences took place in Washington beginning July 10. On July 12, 1916, General Carranza's representative at Washington proposed that each government name three commissioners to "decide forthwith the question relating to the evacuation of the American forces now in Mexico and to draw up and conclude a protocol of agreement regarding the recip-

rocal crossing of the frontier by forces of both governments; also to determine the origin of the incursions to date in order to fix the responsibility therefor and definitely to settle the difficulties now pending or those which may arise between the two countries for the same or similar reasons." This proposal was accepted by the Department of State on July 28, 1916, but with the suggestion "that the powers of the commission be enlarged so that . . . the commission may also consider such other matters, the friendly arrangement of which would tend to improve the relations of the two countries." It was stipulated by both parties that the recommendations of the commission should be subject to the approval of their respective governments.⁵

The *de facto* government replied to the American note on August 4, naming the Mexican members of the joint commission, who, General Carranza stated, had been "instructed to devote their attention preferably to the solution of the points mentioned in the previous note" of Mexico.⁶ This phrase was subsequently explained by the Mexican representative at Washington as not limiting the commission's discussion to the question of troops and border raids, but that the *de facto* government merely desired that these matters should be given preference, and that other questions might be taken up later by the commission.⁷

The joint commission, composed of Hon. Franklin K. Lane, Judge George Gray, and Mr. John R. Mott, for the United States, and Luis Cabrerra, Ignacio Bonillas and Alberto Pani, for Mexico, met at New London, Connecticut, on September 6, 1916, subsequently removed to Atlantic City, New Jersey, and continued their sessions for several months.

While the details of the deliberations of the commission were not made public, press reports and statements issued by the Commissioners from time to time indicated that the differences of opinion between them were not easy of reconciliation. The Mexican Commissioners seemed to be disinclined to discuss any matters relating to internal affairs in Mexico until the question relating to troops on the border was settled. On the other hand, the American Commissioners felt that the settlement of the border question alone would leave the way open for a recurrence of trouble between the two countries. As stated by Secretary Lane in a statement made public on November 24, 1916, the American Commissioners believed that

⁵ New York Times, July 29, 1916.

⁶ *Ibid.*, August 5, 1916.

⁷ *Ibid.*, August 9, 1916.

the border troubles are only symptoms. Mexico needs system treatment, — not symptom treatment. She can give it to herself and we hope she will. . . . We will help her to get into good shape if she can understand that we mean to be her friend. . . . The purpose for which this commission was formed was to exert one last effort toward making Mexico a possible neighbor under the Constitutionalist Government. We do not wish to be forced into intervention or any other course until this opportunity has been exhausted. To this end we must pass from the border matters of irritation, and immediate concern, to the conditions of Mexico which affect the lives and property of our nationals and all other nationals. . . . Then we ask that, with our help or without it, Mexico feed herself and drive out disease. There will be little banditry if Mexico gets to work.

The miseries of Mexico must be assuaged. Her poor, naked, starving, dying peons call out for help. They do not wish constant war, and only one per cent of her people are actually in the war, but all are suffering. We cannot maintain our self-respect or be true to the highest dictates of humanity and see these people suffer as they do because of the chaos that has come from civil war.^a

On November 24 the Commissioners signed a protocol providing for the withdrawal of American troops. The articles of this protocol were as follows:

ARTICLE 1. The Government of the United States agrees to begin the withdrawal of American troops from Mexican soil as soon as practicable, such withdrawal, subject to the further terms of this agreement, to be completed not later than ; that is to say forty (40) days after the approval of this agreement by both governments.

ARTICLE 2. The American commander shall determine the manner in which the withdrawal shall be effected, so as to insure the safety of the territory affected by the withdrawal.

ARTICLE 3. The territory evacuated by the American troops shall be occupied and adequately protected by the Constitutionalist forces, and such evacuation shall take place when the Constitutionalist forces have taken position to the south of the American forces so as to make effective such occupation and protection. The Mexican commissioners shall determine the plan for the occupation and protection of the territory evacuated by the American forces.

ARTICLE 4. The American and Mexican commanders shall deal separately or wherever practicable, in friendly coöperation with any obstacles which may arise tending to delay the withdrawal. In case there are any further activities of the forces inimical to the Constitutional Government which threaten the safety of the international border along the northern section of Chihuahua, the withdrawal of the American forces shall not be delayed beyond the period strictly necessary to overcome such activities.

ARTICLE 5. The withdrawal of American troops shall be effected by marching through Columbus, or by using the Mexican Northwestern Railroad to El Paso, or by boat routes, as may be deemed most convenient or expedient by the American commander.

^a New York Times, November 25, 1916.

ARTICLE 6. Each of the governments parties to this agreement shall guard its side of the international boundary. This, however, does not preclude such coöperation on the part of the military commanders of both countries as may be practicable.⁹

The protocol was accompanied by a memorandum in which the commissioners agreed that "It shall be understood that if we meet for the discussion of other questions, the American Commissioners will not ask that any final agreement shall be reached as to any such questions while the American troops are in Mexico."

Upon the signature of the above protocol the commission issued the following statement regarding the result of their labors up to that time:

The commission has come to an agreement as to withdrawal of American troops in Mexico and border control, which is to go by Mr. Pani to Mexico. If it is acceptable the conferences will be resumed within two weeks. The troops are to be withdrawn by General Pershing within forty days of approval of the agreement, but in such manner as will permit the Mexican troops to occupy the evacuated territory, which the Mexicans have agreed to do.

Should the northern section of Chihuahua be in a state of turmoil such as to threaten our border the American troops may alone or in conjunction with the Mexican troops disburse the marauders and the time for withdrawal shall be extended by the time necessary for such work. The Mexican commander is to have control of the plan by which occupation of northern Chihuahua is effected, and General Pershing is to have control of the plan of withdrawal and the right to use the railroad to Juarez if he so desires.

The commission found it impracticable to arrange a plan of joint border control through a common military force, and abandoned the idea of a border zone which has been so much discussed. It is, however, left to the commanders of both nations on the border to enter into such arrangements for coöperation against marauders whenever it is practicable.

The agreement distinctly states that each side is to care for its own side of the border, but that this shall not preclude coöperation between the two forces to preserve peace upon the border.

Right to Pursue Raiders

The American Commissioners told their Mexican colleagues that as a matter of national necessity the policy of this government must be to reserve the right to pursue marauders coming from Mexico into the United States so long as conditions in northern Mexico are in their present abnormal condition. Such pursuit is not, however, to be regarded by Mexico as in any way hostile to the Carranza Government, for these marauders are our common enemies.

The correspondence between the two State departments under which the commission was created requires the latter to deal not only with withdrawal of troops, but also with all other questions affecting the two countries, chief of which may be

⁹ Text printed in the *Washington Post*, January 3, 1917.

said to be the protection of the lives and property of all foreigners in Mexico. The American Commissioners have not only pressed for the consideration of this matter, but for a number of others, such as the establishment of an international claims commission and the restoration of health conditions in Mexico, where typhus is making headway and death by starvation is common. These questions, as well as many others, have already been considered by the commission informally and are to be given formal consideration when the commission reassembles, which it will as soon as the agreement as to withdrawal and border control, which was officially made of preferential concern, has been approved by both governments.

The present agreement may, therefore, be regarded as the first step only in the work of the commission. If this, however, is not found to be agreeable to the two governments, the commission will, by force of the understanding had between the two State departments, come to an end.¹⁰

A delay of several months ensued before any definite statement was made concerning General Carranza's attitude toward the protocol. Statements emanating from the Mexican Commissioners during this interval indicated that, while Carranza did not object to the terms of the protocol, he objected to the reservation by the American Commissioners, not included in the protocol, but mentioned in the statement accompanying its signature, of the right of the United States to pursue bandits across the border. It was also intimated that General Carranza felt that his approval of the protocol would place him in a position of having appeared to sanction the presence of foreign troops in Mexico. Several sessions of the commission were held late in December to consider General Carranza's suggestions for a modification of the protocol. The American Commissioners declined to entertain such suggestions, however, and, on January 2, 1917, it was officially stated that Carranza had refused to ratify the protocol. The final meeting of the commission was held on January 15, 1917, when it was agreed that further discussion of international questions was impracticable and the commission adjourned.

Pursuant to recommendations of the American Commissioners, however, the President decided to withdraw the American troops, to hold General Carranza's Government responsible for American interests in the territory affected, and to maintain a patrol along the American border, which would be sent into Mexico if necessary to protect American territory and rights. Accordingly on January 28, 1917, orders were issued by the War Department for the withdrawal of the troops and within a week they had returned to American soil.

¹⁰ *New York Times*, November 25, 1916.

At the same time the President decided to send a diplomatic representative to Mexico to take up through diplomatic channels the questions which the joint commission had been unable to adjust. Mr. Henry P. Fletcher, formerly American Minister to Chile, who had been appointed Ambassador to Mexico on February 25, 1916, and detained in the United States because of the unsatisfactory state of the relations between the two countries, arrived in Mexico on February 17, 1917.

Thus closes the long period of interrupted official intercourse between the United States and Mexico, which started with the refusal of the United States to recognize Huerta after the assassination of Madero, who overthrew Diaz. Many believe that it would have been wiser for the United States to have acted upon the principle that it was not concerned as to the manner in which a Mexican president came into power and promptly to have recognized Huerta. Those who hold this view believe that General Huerta could have pacified the country within a few months and thus saved Mexico many years of bloodshed and the United States much concern and no small expenditure of money. They also assert that the failure to recognize Huerta really amounted to intervention in the internal affairs of the country and that the United States is therefore more or less morally responsible for what took place afterwards.

The purpose of this comment is to continue from previous numbers the narrative of events in Mexico, and space will not permit a consideration of the legal or political aspects of the incidents which have been related in the course of the narrative. It is the belief of the writer, however, that there is no basis for the allegation that the American action with regard to Mexico amounted to intervention. He believes further that the American policy accords with the best American practices and traditions. Whether its application to recent events in Mexico was wise can only be determined by the future course of events in that country.

GEORGE A. FINCH.

HAVANA SESSION OF THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

On January 22, 1917, in Havana, the American Institute of International Law began its second session and ended it on January 27th. It was formally invited by the Cuban Government to hold its session in Cuba, and it was the guest of the Cuban Society of International Law.

On the closing day of the session, the Uruguayan Minister to Cuba invited the Institute to hold its next session in the City of Montevideo as the guest of the Republic of Uruguay. This invitation was accepted and the third session of the Institute will accordingly be held in Montevideo in the course of 1918, as the guest of the Uruguayan Government and under the auspices of the Uruguayan Society of International Law.

Without entering into details of the purpose and organization of the Institute, as this has been done in previous issues of the JOURNAL, suffice it to say that it is composed of five publicists of each of the twenty-one American republics, recommended in the first instance by the national society of international law of each American republic and elected in the first instance by the charter members, and, after its organization, by the members of the Institute. Its purpose was and is to bring an equal number of publicists of the different American countries together, in order that by an exchange of views and by personal and provisional coöperation principles of justice which should control at least the relations of American countries may be discovered, made known and put into practice.

At the first session, held in Washington in connection with and under the auspices of the Second Pan American Scientific Congress, the Institute adopted on January 6, 1917, its Declaration of the Rights and Duties of Nations, based in every instance upon an adjudged case of the Supreme Court of the United States, thus showing by a concrete example that not only a legal but a judicial basis for a law of nations exists in fact as well as in theory. Without giving the text of this Declaration, which has been printed in a previous number of the JOURNAL,¹ or going into further details, particular attention is called to the fact that the Institute's Declaration of the Rights and Duties of Nations is not the product of philosophic speculation, although, if it were, this fact would not deprive it of value; but it is, as previously stated, based in every instance upon solemn judgments of the Supreme Court of the United States, which is not only a prototype of an international court, but is an international court and the only permanent and successful international court which has ever been created. The Institute's Declaration was based upon decisions of this tribunal, in order to show that the fundamental principles of the law of nations are legal, capable of ascertainment, definition, application, and development by a court of justice.

¹ January, 1916, (Vol. 10), p. 124.

The Institute adopted a series of recommendations to be known as the *Recommendations of Havana*, dealing with international organization. These recommendations are of a more speculative nature, for they could not very well be based upon the decisions of the Supreme Court or indeed of any other court, as they deal with the things of the future, not of the present and of the past. Like the Declaration, they have little or no claim to originality, as they aim to give form and shape to a sequence of proposals, which may be said to be in the air. They were unanimously adopted and will appear in the proceedings of the Institute, accompanied by a commentary, as in the case of the Declaration of the Rights and Duties of Nations.

The Institute considered a series of projects, which, however, it did not adopt, and upon which it refrained from an expression of opinion, as, before taking action, it seemed desirable to refer them to each of the twenty-one national societies of the American republics, in order to obtain an expression of their views in advance. These projects relate to the fundamental bases of international law, the fundamental rights of the American Continent, the regulation of neutrality in naval war, the organization of a court of arbitral justice, a union or league of nations for the maintenance of peace, the rights and duties of nations which are derived from the fundamental rights. The texts of these projects will appear as appendices to the summary statement called the Final Act of the Havana session, and, of as present interest to the readers of the JOURNAL, the text of this Act, containing the Recommendations of Havana and the enumeration of the projects and proposals referred to the national societies, is printed in English translation in the Supplement to this JOURNAL, p. 47.

JAMES BROWN SCOTT.

SOCIETY FOR THE PUBLICATION OF GROTIUS

The JOURNAL takes pleasure in publishing the following announcement:

The other day a "Society for the publication of Grotius" was formed at The Hague, with the object of preparing a new edition of the works of Hugo Grotius (1583-1645), the famous Dutch scholar, renowned alike as lawyer, theologian, philosopher and historian. A commencement will be made by publishing the letters written by and to Grotius. A committee has been appointed, consisting of the following gentlemen: Professor Mr. C. van Vollenhoven, of Leiden, President; Mr. G. J. Fabius, of Rotterdam, Treasurer; Professor Dr. J. Huizinga, of Leiden;

Professor Dr. A. Eekhof, of Leiden; Mr. G. Vissering, of Amsterdam; Dr. D. F. Scheurleer, of The Hague, and Dr. P. C. Molhuysen, of The Hague, Secretary.

It is perhaps too much to say that Grotius was the founder of international law, as he aims, as shown, to construct a system of international law from the works of his predecessors. The fact remains, however, that he performed this great service, and the three books on the law of war and of peace published in 1625 are the first systematic treatises on the law of nations.

It is not a valid criticism that he did not create what he expounded, and he expounded so well what he found at hand, and so much of the treatise is due to the industry, thought and judgment which he brought to the performance of the self-imposed task that he is rightly considered the father, if not the founder, of international law; and, in any event, he is the author of the first systematic treatise on the subject, and through this treatise, and because of its author, jurisprudence found itself endowed with a new branch of law, and the world with a rule of conduct for the nations. In this vast domain the great Dutchman had no master and he still awaits a rival.

But, great as his service to international law is, has been, and will be, which has made him a benefactor of his kind and of nations, he would be sure of grateful remembrance had he never treated the law of nations. By profession a lawyer, and leader of the bar in his own country, he was a theologian, a poet and a scholar in a day when scholarship meant as great, if not greater, familiarity with Latin and Greek and the literature in those languages than with the language and literature of his own country. He was possessed of the learning of his day and generation to a degree remarkable in any man, and which is almost unbelievable in a man of affairs. In his boyhood Henry IV pronounced him the miracle of Holland, and today he is its glory as well as its miracle.

It is peculiarly appropriate that Dutch scholars should think of Grotius today and announce an edition of his works, for it was in a time of bloodshed and despair that he himself penned his immortal work on the law of nations. "I saw," he said, "in the whole Christian world a license of fighting at which even barbarians might blush, wars begun on trifling pretexts, and carried on without any reverence for Divine or man-made laws, as if that one declaration of war let loose every crime."

Because of this international situation, and because of his belief that

there was a law to be observed in war as well as in peace, he wrote his treatise, which has done more to introduce justice into the conscience of nations than the work of any other man.

May the re-publication of the treatise turn the thoughts and the minds of men to the principles which he advocated, and may the old work in its new form render a new service to the old cause of justice, to justice as between men.

If, unfortunately, the waters of the ocean should sweep over Holland and blot it out forever, it would be immortalized by the work of the man whom the government of that day imprisoned for life when he still honored their country with his presence, and whose dead body was stoned by the people in the streets when it was brought back to Delft for burial. Of a truth "the prophet is not without honor, save in his own country and in his own house."

JAMES BROWN SCOTT.

RESPECT FOR THE AMERICAN FLAG

Among the rights stated by publicists to which nations are entitled is the right to respect, including the right to have their national emblems respected and the respect enforced by penalties if need be. The United States possesses this right as a nation, although adequate steps have not been taken in times past to secure the flag of the United States and the national emblems from desecration. An Act of Congress, approved February 8, 1917, was passed "to prevent and punish the desecration, mutilation, or improper use, within the District of Columbia, of the flag of the United States of America," and the passage of this Act at this time makes brief comment upon the general subject both timely and interesting. This is, however, not the only law on the statute books. In 1905 and in 1907 the question was considered from a different standpoint, and, in allowing trade marks to be registered in the patent office, the flag, national and State emblems were excluded.¹ Two years later this Act was amended by the Act of February 2, 1907, and the clause regarding flags and national emblems was retained without change.²

In the American form of government, the United States, speaking of the States as a whole, possesses the powers which have been spe-

¹ U.S. Statutes at Large, 58 Cong., Vol. 33, Pt. 1, Public Laws, p. 725.

² U.S. Statutes at Large, 59 Cong., Vol. 34, Pt. 1, Public Laws, p. 1251.

cifically or impliedly delegated, and the powers not specifically or impliedly delegated to the United States and not renounced by the States are by the Tenth Amendment to the Constitution "reserved to the States respectively, or to the people." The question might arise as to whether a State of the American Union could pass an Act to prevent and punish the desecration of the flag of the United States, or whether the United States in Congress assembled should alone be able to exercise this as a power impliedly, though not specifically, delegated, or whether both the United States and the States composing the more perfect union could pass laws on the subject and enforce their observance by appropriate penalties. As many States have passed statutes dealing with this subject,³ it was to be expected that the question would one day arise, and that the Supreme Court should be called upon to decide it. This happened in the case of *Halter v. Nebraska* (205 U.S., 34), decided in 1906, and the court declared the State Act constitutional, or declared it not to be unconstitutional. As the opinion of the court is not merely instructive and interesting in itself, but peculiarly timely, when the

³ Laws for the protection of the national flag have been adopted by the states as follows:

Alaska. Sess. Laws, 1913, p. 3	Nebraska. Rev. Stats. 1913, Sec. 8852
Arizona. Sess. Laws, 1913, p. 3; Penal Code, 1913, Sec. 7023	New Mexico. Revised Laws, 1915, Sec. 1812
California. Sess. Laws, 1899, p. 46	Nevada. Rev. Stats. 1912, Sec. 5603
Colorado. Rev. Stats. 1909, Sec. 2599	New Hampshire. Sess. Laws, 1899, p. 302; amended, Sess. Laws, Ch. 87, 1915
Connecticut. Gen. Stat. 1902, Sec. 1386	New Jersey. Sess. Laws, 1904, p. 34
Delaware. Sess. Laws, 1903, p. 892	New York Penal Laws, 1909, Ch. 88, Sec. 1425
Hawaii. Rev. Stat. 1915, Sec. 4223	North Dakota. Penal Code, 1905, Sec. 9427
Idaho. Penal Code, 1908, Sec. 7215	Oregon. General Laws, 1901, p. 286
Illinois. Sess. Laws, 1907, p. 351	Pennsylvania. Sess. Laws, 1907, p. 225
Indiana. Sess. Laws, 1901, p. 351	Porto Rico. Rev. Stat. 1911, Sec. 958
Iowa. Sess. Laws, 1913, p. 315	Rhode Island. General Laws, 1909, Ch. 349, Sec. 3941
Kansas. Sess. Laws, 1905, p. 300	Utah. Penal Code, 1907, Sec. 4487
Louisiana. Sess. Laws, 1912, p. 41	Vermont. Public Stat. 1906, Sec. 5969
Maine. Rev. Stat. 1903, Stat. 118, Sec. 5	Washington. Criminal Code, 1909, Sec. 423
Maryland. Sess. Laws, 1902, p. 720	Wisconsin. Statutes, 1913, Sec. 4575
Michigan. Pub. Act, 1901, p. 139	Wyoming. Rev. Stat., 1910, Sec. 5984.
Massachusetts. Rev. Stats. 1903, Sec. 206	
Minnesota. Gen. Stat. 1913, Sec. 9012	
Missouri. Rev. Stat. 1909, Sec. 4884	
Montana. Penal Code, 1907, Sec. 8875	

United States is just entering upon a war, the material portion of Mr. Justice Harlan's opinion is quoted:

From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

It may be said that as the flag is an emblem of National sovereignty, it was for Congress alone, by appropriate legislation to prohibit its use for illegitimate purposes. We cannot yield to this view. If Congress has not chosen to legislate on this subject, and if an enactment by it would supersede state laws of like character, it does not follow that in the absence of National legislation the State is without power to act. There are matters which, by legislation, may be brought within the exclusive control of the General Government, but over which, in the absence of National legislation, the State may exert some control in the interest of its own people. For instance, it is well established that in the absence of legislation by Congress a State may, by different methods, improve and protect the navigation of a waterway of the United States wholly within the boundary of such State. So, a State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State. One who loves the Union will love the State in which he resides and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. By the statute in question the State has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic, a purpose wholly foreign to that for which it was provided by the Nation. Such an use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor. And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that any one has a right of property which is violated by such an enactment as the one in question. If it be

said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation — which, in itself, cannot belong, as property, to an individual — has been placed on such a thing in violation of law and subject to the power of Government to prohibit its use for purposes of advertisement.

Looking then at the provision relating to the placing of representations of the flag upon articles of merchandise for purposes of advertising, we are of opinion that those who enacted the statute knew, what is known of all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected. . . .

JAMES BROWN SCOTT.

THE DANISH WEST INDIES

On March 31, 1917, the transfer of the Danish West Indies from Denmark to the United States took place by the payment of the purchase price to Denmark by the United States, the transfer of physical possession of the Islands from Danish to American officials and the replacing of the Danish flag by that of the United States.

An outline of the treaty of cession and of the previous efforts of the United States to acquire the islands appeared in this JOURNAL for October, 1916, page 853. The official text of the treaty is now printed in the Supplement to this number of the JOURNAL, page 53.

In advising and consenting to the ratification of the treaty, the Senate of the United States, in order to bring the convention clearly within the Constitutional powers of the United States with respect to church establishment and freedom of religion, stipulated that the convention shall not be taken or construed as "imposing any trust upon the United States with respect to any funds belonging to the Danish National Church in the Danish West Indian Islands, or in which the said church may have an interest, nor as imposing upon the United States any duty or responsibility with respect to the management of any property belonging to said church, beyond protecting said church

in the possession and use of church property as stated in said convention, in the same manner and to the same extent only as other churches shall be protected in the possession and use of their several properties." This stipulation was incorporated in an exchange of notes on January 3, 1917, between the Secretary of State and the Danish Minister, which notes are also printed in the Supplement.

The motives which have actuated the United States in its efforts to acquire the islands, now crowned with success, are too well known to require any extended comment. The present views of the United States on this subject were succinctly placed before Congress at its last session by Secretary of State Lansing in recommending the appropriation of the purchase money so as to carry out the treaty now in force. Mr. Lansing said:

This convention is responsive to the conviction of both governments, as well as of the people of the islands, that the Danish West Indies should belong to the United States. This conviction, as is well known, has been manifested in earlier treaties for the transfer of these islands to the United States. Without entering upon any extended historical review of the negotiations of these earlier treaties, it may be pointed out that the first negotiations for the purchase of the islands were initiated by Secretary Seward during the administration of President Lincoln and before the close of the Civil War, culminating in the convention signed at Copenhagen October, 24, 1867, during the administration of President Johnson, for the cession of the Islands of St. Thomas and St. John. It is the opinion of students of this subject that this convention was brought about through the conviction of the United States, gained by its naval operations during the Civil War, of the need of a naval coaling supply and repair station in the Caribbean Sea in order that the United States might be placed on a footing with other great Powers owning islands in those waters. This conviction, no doubt, was strengthened by the fact that the United States emerged from that war as a maritime Power to whom a good harbor and depot in the West Indies had become a matter of so great importance, if not of necessity, that the United States could not wish to see the Danish West Indies fall into the hands of another Power.

Although the plebiscite in St. Thomas and St. John held under the treaty of 1867 was overwhelmingly in favor of the cession, and the treaty was promptly approved by the Danish Rigsdag and ratified and signed by the King, and although the period for ratification was extended from time to time to April 14, 1870, the Senate Committee on Foreign Relations took no action until March 24, 1870, when Senator Sumner reported it adversely and the Senate acquiesced in that opinion.

Prior to the Spanish War overtures were again made for the cession of the islands — this time initiated by the Danish Government. During the Spanish War the question of the purchase of the islands was further agitated. Concurrently with the discussion of the Isthmian Canal and the protection of the islands obtained from Spain, a second treaty for the purchase of the Danish West Indies was signed at

Washington, January 24, 1902. In reporting this treaty favorably to the Senate, Senator Cullom, of the Committee on Foreign Relations, stated:

"These islands, together with Porto Rico, are of great importance in a strategic way, whether the strategy be military or commercial. St. Thomas is the natural point of call for all European trade bound to the West Indies, Central America, or northern South America. These islands, together with Porto Rico, form the north-eastern corner of the Caribbean Sea, and are of great importance in connection with the American isthmus, where a canal will be constructed between the Atlantic and Pacific. They are of first importance in connection with our relations to the region of the Orinoco and the Amazon and with our control of the Windward Passage."

The treaty was approved by the United States Senate February 17, 1902, but failed of ratification by a tie vote in the upper house of the Danish Rigsdag.

All of the reasons upon which the two prior treaties were based, whether strategic, economic, or political, are of more force to-day than in previous years. There can be no question as to the value of St. Thomas Harbor as a naval port, with its circular configuration, ample roadsteads, protection from prevailing winds and seas, and facilities for fortifications. Moreover, the advantages of the possession of a naval base off the entrance of the Panama Canal and near the island of Porto Rico are self-evident.

The commercial value of the islands cannot be doubted. Lying in close proximity to many of the passages into the Caribbean Sea, the use of St. Thomas Harbor as a supply station for merchant ships plying between the United States and South America, and for vessels in other trades, is of great importance. The existing modern harbor works, floating docks, marine slip and wharves provided with electric cranes, oil reservoirs, coal depots, fresh-water tanks, machine shops, and warehouses contribute to the commercial advantages of St. Thomas Harbor as a port of call and transshipment for ships in the Central and South American trades.

The political importance of extending American jurisdiction over the islands is not to be overlooked. The Caribbean is within the peculiar sphere of influence of the United States, especially since the completion of the Panama Canal, and the possibility of a change of sovereignty of any of the islands now under foreign jurisdiction is of grave concern to the United States. Moreover, the Monroe Doctrine, a settled national policy of the United States, would have caused this country to look with disfavor upon the transfer of sovereignty of the Danish West Indies to any other European nation.

In view of these considerations, the treaty of cession of these islands to the United States is a matter of no small moment in this country. I do not hesitate, therefore, to recommend that the Congress be urged to take action during the present session to enable this Government to discharge its conventional obligation to Denmark by the payment to the Government of Denmark of the sum of \$25,000,000 by April 17 next.¹

On March 3, 1917, the President approved an Act of Congress to provide a temporary government for the Danish West Indies. This Act is also printed in the Supplement to this JOURNAL, page 96. The

¹ House Report, No. 1505, 64th Cong. 2d Sess.

Act gives the President authority to assign an officer of the Army or of the Navy to serve as governor of the islands. After careful consideration it was decided that the islands should be administered by the Navy Department, instead of the War Department which governs the other insular possessions of the United States. Rear Admiral James H. Oliver has been appointed the first American governor.

GEORGE A. FINCH.

DEMOCRATIC RUSSIA

ON July 4, 1776, the thirteen United States of America proclaimed their independence in a document which has not yet lost its point or application, and, in doing so; laid down certain principles which were revolutionary then and now, and which will engender revolutions until they shall triumph, not merely in the minds and hearts of men, but in the form of government and in the practice of nations.

We hold these truths (the Declaration runs) to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The last people to confess its faith in the right of the people to alter or abolish a form of government which had become destructive of these ends and to institute new government "as to them shall seem most likely to effect their safety and happiness" is the Russian people, and, like the revolutionary statesmen of 1776, the revolutionary statesmen of Russia of 1917 have issued an appeal to the peoples in accordance with "a decent respect to the opinions of mankind." The facts which they submitted to a candid world are contained in the appeal of the Executive Committee dated March 18, 1917, and, omitting the

names of the Cabinet, this important document, this charter of liberty and of a nation's hope follows in full:

Citizens: The Executive Committee of the Duma, with the aid and support of the garrison of the capital and its inhabitants, has succeeded in triumphing over the obnoxious forces of the old regime in such a manner that we are able to proceed to a more stable organization of the executive power, with men whose past political activity assures them the country's confidence.

[The names of the members of the new Government are then given and the appeal continues:]

The new Cabinet will base its policy on the following principles:

First — An immediate general amnesty for all political and religious offenses, including terrorist acts and military and agrarian offenses.

Second — Liberty of speech and of the press; freedom for alliances, unions, and strikes, with the extension of these liberties to military officials within the limits admitted by military requirements.

Third — Abolition of all social, religious, and national restrictions.

Fourth — To proceed forthwith to the preparation and convocation of a constitutional assembly, based on universal suffrage, which will establish a governmental regime.

Fifth — The substitution of the police by a national militia, with chiefs to be elected and responsible to the Government.

Sixth — Communal elections to be based on universal suffrage.

Seventh — The troops which participated in the revolutionary movement will not be disarmed, but will remain in Petrograd.

Eighth — While maintaining strict military discipline for troops on active service, it is desirable to abrogate for soldiers all restrictions in the enjoyment of social rights accorded other citizens.

The Provisional Government desires to add that it has no intention to profit by the circumstances of the war to delay the realization of the measures of reform above mentioned.

We do not know at the present writing the history of the movement which resulted in the abdication of the Romanoffs and the substitution in their place of a government "of the people, by the people and for the people." We know that the leaders of thought in Russia have prayed, have lived, have worked, have died for better things, and we who believe in better things know that they have not worked and died in vain. The immediate cause of the overthrow of the Romanoff dynasty seems to have been the issue of two ukases suspending the sittings of the Duma and the Council of the Empire, but behind this was the longing for better things which took advantage of the condition produced by the un wisdom of the Czar, just as it would have taken advantage of a favorable condition at some future time. On the

same fateful day of March 16, 1917, the Czar abdicated the throne which was not longer his in favor of his brother, the Grand Duke Michael, and the latter gentleman, either believing in the American doctrine of the consent of the governed, or not quite sure that the brother could pass title to what he no longer possessed, would apparently have none of it, unless the people should insist upon his accepting the throne. The following is the text of the Czar's abdication:

We, Nicholas II, by the Grace of God Emperor of all the Russias, Czar of Poland, and Grand Duke of Finland, etc., make known to all our faithful subjects:

In the day of the great struggle against a foreign foe, who has been striving for three years to enslave our country, God has wished to send to Russia a new and painful trial. Interior troubles threaten to have a fatal repercussion on the final outcome of the war. The destinies of Russia and the honor of our heroic army, the happiness of the people, and all the future of our dear Fatherland require that the war be prosecuted at all cost to a victorious end. The cruel enemy is making his last effort, and the moment is near when our valiant army, in concert with those of our glorious Allies, will definitely chastise the foe.

In these decisive days in the life of Russia we believe our people should have the closest union and organization of all their forces for the realization of speedy victory. For this reason, in accord with the Duma of the Empire, we have considered it desirable to abdicate the throne of Russia and lay aside our supreme power.

Not wishing to be separated from our loved son, we leave our heritage to our brother, the Grand Duke Michael Alexandrovitch, blessing his advent to the throne of Russia. We hand over the Government to our brother in full union with the representatives of the nation who are seated in the legislative chambers, taking this step with an inviolable oath in the name of our well-beloved country.

We call on all faithful sons of the Fatherland to fulfill their sacred patriotic duty in this painful moment of national trial and to aid our brother and the representatives of the nation in bringing Russia into the path of prosperity and glory. May God aid Russia.

And the following is the text of Grand Duke Michael's statement:

This heavy responsibility has come to me at the voluntary request of my brother, who has transferred the imperial throne to me during a period of warfare which is accompanied with unprecedented popular disturbances.

Moved by the thought, which is in the minds of the entire people, that the good of the country is paramount, I have adopted the firm resolution to accept the supreme power only if this be the will of our great people, who, by a plebiscite organized by their representatives in a constituent assembly, shall establish a form of government and new fundamental laws for the Russian State.

Consequently, invoking the benediction of our Lord, I urge all citizens of Russia to submit to the Provisional Government, established upon the initiative of the Duma and invested with full plenary powers, until such time, which will follow with as little delay as possible, as the constituent assembly on a basis of univer-

sal, direct, equal, and secret suffrage, shall, by its decision as to the new form of government, express the will of the people.

It is a source of congratulation to the Americans that the United States should have been the first nation to recognize the new government of Russia based upon the consent of the governed, for on March 22, 1917, the Honorable David R. Francis, American Ambassador to Petrograd, formally recognized the provisional government on behalf of the United States.

On April 16, 1816, the great Napoleon is reported by De las Casas to have said, after referring to the perilous situation in which the continent of Europe then was, that "in the present state of things before one hundred years all Europe may be all Cossack or all republican." Let us hope that, whether Cossack or republican, the new Europe will accept the principles of the Declaration of Independence and make them realities.

JAMES BROWN SCOTT.

THE ATTITUDE OF THE UNITED STATES TOWARD POLITICAL DISTURBANCES IN CUBA

THE President of the Republic of Cuba is elected for the period of four years, and presidential elections were held on November 1, 1916. President Menocal was the candidate of the conservative party for reelection. Dr. Alfredo Zayas was the liberal candidate. The election of neither was conceded by the partisans of the other and fraud was freely charged by both parties. The Cuban Government has profited by the experience of the United States in the Hayes-Tilden case by having a Central Commission to which an appeal may be taken in case of contested elections, and an appeal lies in fact and in law from the Central Commission to the Supreme Court of the Island. In case the Supreme Court should not be able to determine the result in a given district or province, it may order a new election in such district or province. This has happened in the case of the Provinces of Santa Clara and Oriente.

Charges were made that the government would not allow the voters freely to cast their ballots in Santa Clara and Oriente and an appeal was made in certain quarters to the United States to send a commission to the Island in order to examine the returns of November first, in order to determine the result of the election. This the United States was unwilling to do, and the United States was also unwilling

to have military pressure exerted by the government in the elections to be held in Santa Clara and Oriente, as it wanted the elections to be free and to express the desires of the Cuban people. The election was held in Santa Clara on the tenth of February, 1917, and resulted in an overwhelming majority for the conservative party. Elections were to have taken place in Oriente on February 20 but before this date the liberals in certain portions of the island, principally in Camaguey and Oriente, resorted to arms.

Some of Zayas' partisans brought pressure upon the United States to intervene, which this country wisely refused to do. In 1906, because of disputed elections, the United States intervened and the liberal party triumphed in the election held during the American occupation. General Miguel Gomez had been the leader of the revolution of 1906 and he was the leader of the revolution of 1917, and his party, if not he himself, would have been the beneficiary if the recent revolution had been successful. President Menocal took vigorous and strong measures to crush the uprising. Gomez himself was captured, and the rebellion broken and elections were set in Oriente. If the United States had not intervened in 1906, the revolution of 1917 would probably not have happened, and, if the United States had intervened in 1917, as it was urged by some liberal leaders to do, the United States would probably have had to intervene whenever a party defeated at the polls or deprived, as it claimed, of its victory by fraud, should resort to revolution and the systematic destruction of life and property.

The attitude of the United States with respect to the uprising in Cuba was set forth in an instruction dated February 10th to the American Minister at Havana, and published in the *New York Times* for February 13, 1917. The text follows:

The Government of the United States, in view of its relations with the Republic of Cuba and on account of the duties which are imposed upon it by the agreement between the two countries, is regarding with no small concern the question of the new elections in Santa Clara province, which it is understood is an effort to carry out the laws providing the machinery for settling election disputes, and upon which laws the constitutional Government must depend. In this case it is understood that the law provides that election disputes be settled by a Central Committee with an appeal to the Supreme Court of Cuba and ultimately, should the dispute remain unsettled, by a re-election to be held in the districts in dispute.

The Government of the United States is confident that both parties are endeavoring to do their utmost to settle their difficulties through the agencies provided

by law and without having recourse to methods which would cause a disturbance throughout the republic, and it would view with gratification the invoking of the constituted judicial methods by the people of Cuba, particularly at the present time when a great portion of the world is embroiled in armed conflict. Such a settlement of their disputes would undoubtedly stand as a fine example before the world as a case where misunderstandings were being adjusted by law instead of by arms.

The Government of the United States, as a friend of the Republic of Cuba, desires to point out that election controversies have not been unknown within its territory, in which party feeling ran at the highest pitch, and wishes to recall to mind that these disputes have always been settled by legal and peaceful means. The most notable case which has occurred in the United States was the Hayes-Tilden controversy, in which the legally established elective machinery finally decided in favor of the candidate who had the minority of the popular vote. This controversy clearly proved that patriotism was elevated by a resort to law rather than by appeal to arms.

The Government of the United States better than any other nation knows the patriotism of the Cuban people, and, mindful of the patriotic deeds done by the Cuban heroes in their struggles for liberty, is confident that the same patriotic spirit will prevail in the settlement of the present electoral difficulty, and that it will be shown by implicit faith in the legal means which have been established for the settlement of such questions.

In view of the interest which this Government feels for the future of Cuba as a nation highly advanced in patriotism and social development, it is anxious that all the parties should know that their course is being followed by the United States with the closest observance and in the confident expectation that the means provided for by the Cuban Constitution and the laws enacted for this very purpose will bring as a logical result a satisfactory and peaceable settlement of the present difficulties.

Three days later, on February 13, 1917, the American Minister was instructed to deliver a further statement to the Cuban Government, the text of which was as follows, according to the *New York Times* of February 15, 1917:

The Government of the United States has received with the greatest apprehension the reports which have come to it to the effect that there exists organized revolt against the Government of Cuba in several provinces and that several towns have been seized by insurrectionists.

Reports such as these of insurrection against the constituted government cannot be considered except as of the most serious nature, since the Government of the United States has given its confidence and support only to governments established through legal and constitutional methods.

During the last four years the Government of the United States has clearly and definitely set forth its position in regard to the recognition of governments which have come into power through revolution and other illegal methods, and at this time desires to emphasize its position in regard to the present situation in Cuba.

Its friendship for the Cuban people, which has been shown on repeated occa-

sions, and the duties which are incumbent upon it on account of the agreement between the two countries, force the Government of the United States to make clear its future policy at this time.

In response to these various communications, the Cuban Secretary of State, Dr. Pablo Desvernines, issued a statement of the Cuban attitude, which is in part as follows:

Some erroneous information must have been given to the Government of the United States when it believes it necessary to express to the President (of Cuba) its anxiety with respect to the elections which are to be held in the Province of Santa Clara, and to remind him of the legal dispositions which regulate electoral matters here.

The Government of Cuba surely will do nothing contrary to law and justice. But precisely because of its desire that these laws should be complied with, neither will it permit anyone here to disturb order or to try, by fraud or violence, to alter legal procedure under which elections should be held, and will energetically repress any illegal attempt of this kind, as it is now proceeding, by means of competent tribunals, in a criminal suit begun because of the discovery of a conspiracy seemingly against the life of the President of the Republic.

Finally, the United States considered it advisable, in view of all the circumstances, to restate its position, in order that there might be no doubt or uncertainty in the minds of the Cuban people as to its attitude in the premises. Therefore, on February 20, 1917, Secretary Lansing sent the following instructions to the American Minister:

It is hardly necessary to state that the events of the past week in connection with the revolt against the Government of Cuba have been viewed with the closest scrutiny by the Government of the United States, which government having set forth its attitude in previous statements, in regard to the confidence and support which it gives to constitutional governments and the policy which it has assumed towards the disturbance of peace through revolutionary methods, wishes again to inform the Cuban people as to its present position:

1. The Government of the United States supports and sustains the constitutional government of the Republic of Cuba.

2. The armed revolt against the constitutional government of Cuba is considered by the Government of the United States as a lawless and unconstitutional act and will not be countenanced.

3. The leaders of the revolt will be held responsible for injury to foreign nationals and for destruction of foreign property.

4. The Government of the United States will give careful consideration to its future attitude towards those persons connected with and concerned in the present disturbance of peace in the Republic of Cuba.

From the passages above quoted, it is evident that the United States did not wish to intervene in Cuba and that it did not intend to

allow itself to be forced to intervene because of the misconduct of the rebels. The United States was not indifferent to the situation in Cuba, but it felt that if frauds had been perpetrated they should be detected and punished according to law, and that the resort should be made to law and not an appeal to arms. The United States did not attempt to decide who was or who was not elected, regarding this as an affair of the Cuban people, but, when some of the partisans of the liberal candidate raised the standard of revolt in February, the United States declared itself squarely on the side of the government, because, whether President Menocal was or was not reelected on November 1, 1916, he was the constitutional President of Cuba until the expiration of his term on May 20, 1917, and a revolution against his government before May 20th was a rebellion against a duly constituted and recognized government. By an appeal to arms, the liberals put themselves in the wrong and by force of arms they were put down.

It would have been easy for the United States to intervene had it cherished designs upon the independence of Cuba, and the rebels could easily, had they not been discouraged by the mere destruction of life and property, have afforded the United States a pretense for intervention under the third clause of the Platt Amendment. The United States did not, however, invoke the amendment, and the legitimate government, without armed interference from the United States, proved itself strong enough to put down the rebellion. Because of this fact, it will be easier for Cuba to settle its own differences without calling in the guarantor of its independence, and it will be easier for the United States to refuse to intervene, because it has been shown in 1917 that intervention was unnecessary. The two governments apparently understand one another, and each is as apparently unwilling as the other to invoke the Platt Amendment.¹

JAMES BROWN SCOTT.

¹ For the origin and purpose of the Platt Amendment, see editorial in this JOURNAL for July, 1914, p. 585.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Cd.*, Great Britain, Parliamentary Papers; *Clunet*, J. de Dr. Int. Privé, Paris; *Current History* — Current History — A Monthly Magazine of the New York Times; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletín de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; *M.*, Magazine; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Belgium, Moniteur belge; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q. Quarterly Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

May, 1916.

- 20 GREAT BRITAIN — PORTUGAL. Ratifications exchanged of the treaty of commerce and navigation signed Aug. 12, 1914. English and Portuguese texts: *G. B. Treaty Series*, 1916, No. 6.

August, 1916.

- 22 COLOMBIA — VATICAN. Colombia abrogated the Concordat signed Dec. 31, 1887. Text: *R. de la Instrucción Pública*, 28:557.
- 24 FRANCE — GREAT BRITAIN. Agreement signed respecting trade with Morocco and Egypt in transit through British and French territories in Africa. Text: *G. B. Treaty Series*, 1916, No. 7.

September, 1916.

- 8 HONDURAS — NICARAGUA. Statement previously made that Honduras had filed suit against Nicaragua in the Central American Court of Justice was incorrect. This JOURNAL, 10:904.

October, 1916.

- 25 FRANCE — GREAT BRITAIN — RUSSIA. Exchange of notes modifying Article 2 of the convention of Nov. 9, 1914, relating to prizes captured during the present war. Text: *G. B. Treaty Series*, 1916, No. 5.

December, 1916.

- 7 GREAT BRITAIN — UNITED STATES. Ratifications exchanged of the treaty for the protection of migratory birds signed Aug. 16, 1916. Date of ratification previously stated as Dec. 9. Text: *U.S. Treaty Series*, No. 628; this JOURNAL, 11:172.
- 11 GERMANY — UNITED STATES. Germany replied to the American protest against the deportations of Belgians, dated Nov. 15–29. Text issued by the Dept. of State; *Current History*, 5:674.
- 12 GERMANY. Germany addressed identic notes to the neutral Powers and a note to The Vatican suggesting that the time had arrived for the consideration of the terms upon which the present war might be ended. Texts of notes: *Current History*, 5:588.
- 12 AUSTRIA. Austria issued statement relative to the German peace proposal of even date. Text: *Current History*, 5:589.
- 14 RUSSIA. Semi-official statement made relative to the German peace note of Dec. 12. Resolutions passed by the Duma. Texts: *Current History*, 5:590; *London Times*, Dec. 15, 16, 1916.
- 19 ITALY. Italy replied to the German peace note of Dec. 12. Text: *Current History*, 5:591.
- 20 AUSTRIA. Count Clam Martinez became prime minister of Austria. *N. Y. Times*, Dec. 21, 1916.
- 22 DENMARK, NORWAY AND SWEDEN addressed identic notes to the belligerents relative to bringing the present war to an end. *N. Y. Times*, Jan. 17, 1917.
- 23 AUSTRIA. Baron Burian succeeded as Minister for Foreign Affairs by Count von Chudnitz. *N. Y. Times*, Dec. 24, 1916.
- 23 FRANCE-GREAT BRITAIN. Declaration signed concerning the exchange of parcels post between New Zealand and the French settlements of Oceania. French and English texts: *G. B. Treaty Series*, 1917, No. 2.
- 23 FRANCE-GREAT BRITAIN. Agreement signed concerning the exchange of post office money orders between Mauritius and Madagascar. French and English texts: *G. B. Treaty Series*, 1917, No. 1.
- 23 SWITZERLAND. Swiss Government in note to neutrals and belligerents acknowledging the note from President Wilson of Dec. 18, 1916, offers services to assist in bringing about peace. Text: *N. Y. Times* Dec. 25, 1916; *Independent* Jan. 8, 1917.

- 25 RUSSIA. The Czar of Russia issued proclamation relative to terms of peace. Text: *London Times (Weekly ed.)*, Jan. 5, 1917.
- 26 AUSTRIA. Austrian Government replied to the note of President Wilson dated Dec. 18, 1916. Text: *Current History*, 5:783.
- 26 GERMANY. German Government replied to the note of President Wilson dated Dec. 18, 1916. Text issued by the Dept. of State; *Independent*, Jan. 8, 1917.
- 26 TURKEY. The Turkish Government replied to the note of President Wilson dated Dec. 18, 1916. Text issued by the Dept. of State.
- 28 GERMANY. German Government replied to the Swiss note of Dec. 23, 1916. Text: *N.Y. Times*, Dec. 29, 1916.
- 29 DENMARK, NORWAY AND SWEDEN. These governments replied in identic notes to the note of President Wilson dated Dec. 18, 1916. Text: *N. Y. Times*, Dec. 30, 1916.
- 30 BULGARIA. Bulgarian Government replied to the note of President Wilson dated Dec. 18, 1916. Text issued by the Dept. of State.
- 30 ENTENTE ALLIES. Replied to the proposal of the Central Powers relative to the suggestion that means for ending the present war might now be considered, dated Dec. 12, 1916. Text: *N. Y. Times*, Dec. 31, 1916; *Current History*, 5:801.
- 30 GREECE. King Constantine replied to the note of President Wilson dated Dec. 18, 1916. Text: *N. Y. Times*, Jan. 1, 1917; *Current History*, 5:792.
- 30 SPAIN. Spanish Government replied to the note of President Wilson dated Dec. 18, 1916. Text: *Current History*, 5:792.

January, 1917.

- 1 AUSTRIA-HUNGARY. Austro-Hungarian Government replied to the Scandinavian note of Dec. 22, 1916. Text: *N. Y. Times*, Jan. 2, 1917.
- 1 GERMANY. German Government acknowledged the Scandinavian peace note of Dec. 22, 1916. Text: *N. Y. Times*, Jan. 4, 1917.
- 1 TURKEY. Turkish Government announced the abrogation of the Treaty of Paris, signed March 10, 1856, and the Treaty of Berlin, signed Aug. 3, 1878. Text: *Current History*, 5:822; *N. Y. Times*, Jan. 2, 1917.
- 3 FRANCE. Contraband list published, additional to the lists of Oct. 14, 1915, Jan. 27, April 3, June 28, Oct. 13, and Nov. 23, 1916. *J. O.*, 1917:51.

- 5 FRANCE — SWITZERLAND. Announcement made that France had renewed assurances concerning Swiss neutrality. *London Times (Weekly ed.)*, Jan. 12, 1917.
- 6 NICARAGUA. General Emilio Chamorro inaugurated President. *N. Y. Times*, Jan. 7, 1917.
- 7 UNITED STATES. The Senate indorsed the note of President Wilson, dated Dec. 18, 1916, by vote of 48 to 17. *N. Y. Times*, Jan. 8, 1917.
- 9 GREECE. The Entente Allies issued a new ultimatum to Greece demanding acceptance of its terms in 48 hours. Text: *London Times (Weekly ed.)*, Jan. 12, 1917.
- 9 GREAT BRITAIN. The Admiralty issued statement defining policy as to arming merchant ships. *N. Y. Times*, Jan. 10, 1917.
- 9 CHINA. The Chinese Government answered the note of President Wilson dated Dec. 18, 1916. Text issued by the Dept. of State.
- 10 RUSSIA. Prince Golitzen became prime minister in place of M. Trepoff. *London Times (Weekly ed.)*, Jan. 12, 1917.
- 10 ENTENTE ALLIES. Reply made to the note of President Wilson dated Dec. 18, 1916. Text issued by the Dept. of State; *Current History*, 5:783.
- 10 GERMANY — UNITED STATES. The German Consul General in San Francisco, Franz Bopp, and four assistants were found guilty of violating American neutrality by plotting to blow up munition shipments, and sentenced to two years' imprisonment. *N. Y. Times*, Jan. 11, 1917.
- 10 GREAT BRITAIN. Order in council issued making terms "enemy goods" and "enemy origin" apply to goods destined for or originating in enemy territory, and the term "enemy property" apply to all goods of persons domiciled in enemy country. *London Gazette*, No. 29990; text issued by the Dept. of State.
- 11 GERMANY. German Government sent note to neutrals relative to the refusal of the Entente Allies to consider the German peace proposal made Dec. 12, 1916. Text: *Current History*, 5:789; *London Times*, (*Weekly ed.*) Jan. 19, 1917.
- 11 AUSTRIA-HUNGARY. Austro-Hungarian Government sent note to neutral Powers relative to the refusal of the Entente Allies to consider the German peace proposal made Dec. 12, 1916. Summary: *N. Y. Times*, Jan. 13, 1917.

- 11 GREECE. Accepted the demands of the Entente Allies. *London Times (Weekly ed.)*, Jan. 12, 1917.
- 13 ENTENTE ALLIES. Note supplemental to the reply of Jan. 10, made to the note of President Wilson dated Dec. 18, 1916. Text: *Current History*, 5:786; *London Times (Weekly ed.)*, Jan. 19, 1917; text issued by the Dept. of State.
- 15 ITALY. Accession of Italy to the convention of Nov. 9, 1914 between the United Kingdom and France relating to prizes captured during the present war. English and Italian texts: *G. B. Treaty series*, 1917, No. 6.
- 15 MEXICO — UNITED STATES. The American-Mexican joint commission was dissolved. *N. Y. Times*, Jan. 16, 1917.
- 15 PERSIA. The Persian Government replied to the note of President Wilson dated Dec. 18, 1916. Text: *N. Y. Times*, Jan. 16, 1917.
- 16 GREECE. The Greek Government replied to the note of President Wilson dated Dec. 18, 1916. The King of Greece sent personal reply on Dec. 30, 1916. Summary: *N. Y. Times*, Jan. 1, 17, 1917; *Current History*, 5:792.
- 17 ENTENTE ALLIES. Replied to the Scandinavian note of Dec. 22, 1916. *N. Y. Times*, Jan. 17, 1917.
- 17 DANISH WEST INDIES. Ratifications exchanged of the treaty for the cession of Danish West Indies to the United States by Denmark. On March 3, Public Act 389 provided for the payment of the purchase price of \$25,000,000, and also for the civil government of the islands. English and Danish texts: *U. S. Treaty Series*, No. 629.
- 17 VATICAN. The Vatican sent a note to the German government relative to the deportations of Belgians. Text: *N. Y. Times*, Jan. 18, 1917.
- 17 VATICAN. The Vatican answered the German note of Dec. 12, 1916. *N. Y. Times*, Jan. 18, 1917.
- 18 POLAND. Prince Niemoyovski appointed Viceroy of Poland. *Independent*, Jan. 29, 1917.
- 19 GERMANY — MEXICO. Germany addressed note to the German minister to Mexico informing him of Germany's intention to begin unrestricted submarine warfare on February 1, and under certain circumstances authorizing him to propose to the Mexican Government to join Mexico in making war upon the United States, promising Mexico general financial support and the lost

- Mexican states of Arizona, New Mexico, and Texas. He was further instructed to suggest that Mexico communicate with the Government of Japan and on its own initiative offer mediation between Germany and Japan. Text: *N. Y. Times*, March 1, 1917.
- 20 GERMANY. The German Government sent memorial to the United States defending the deportations of Belgians. Text: *Current History*, 5:1107.
- 22 UNITED STATES. President Wilson addressed the Senate on the subject of peace and the formation of a League to Enforce Peace. Text issued by the Dept. of State; *N. Y. Times*, Jan. 23, 1917.
- 23 CHINA — JAPAN. The Chenghia-tung incident which occurred in August, 1916, settled by agreement. Summary: *London Times (Weekly ed.)*, Feb. 2, 1917.
- 24 GREAT BRITAIN. Notice given to take effect Feb. 7, 1917, that certain defined areas in the North Sea will be dangerous to shipping. To meet the need of the Netherland coastal traffic a safe passage is left and defined. Text issued by the Dept. of State; *Current History*, 5:995.
- 27 COSTA RICA. The President of Costa Rica, Alfonso Gonzales, deposed by military force and the administrative power conferred on the Minister of War, Federico Tinoco. *N. Y. Times*, January 28, 1917.
- 28 BELGIUM. The Belgian Legation at Washington issued a statement replying to the German memorial relative to Belgian deportations. Text: *Current History*, 5:1110.
- 31 MEXICO. Delegates to the Mexican Constitutional convention signed the new constitution. *Mexican Review*, March, p. 2.
- 31 GERMANY. The German Government sent note to the United States acknowledging the receipt of the President's message to Congress of Jan. 22, and stating Germany's position relative to European peace. With this note were two memoranda declaring a blockade of the ports of the Entente Allies and prescribing conditions for American vessels trading therein. Texts issued by the Dept. of State; *Current History*, 5:963; *N. Y. Times*, Feb. 2, 1917.
- 31 AUSTRIA-HUNGARY—UNITED STATES. Austria-Hungary sent note acknowledging receipt of the President's address of January 22, and stating Austria-Hungary's position relative to European

peace. Announcement is made of the blockade of the ports of the Entente Allies. *Text issued by the Dept. of State.*

February, 1917.

- 3 GERMANY — UNITED STATES. The United States broke off diplomatic relations with Germany and handed passports to Count von Bernstorff, German Ambassador. Under safe conduct granted by the Entente Allies, Count von Bernstorff and his party, numbering 149 persons, sailed on the Scandinavian liner *Frederik VIII* on February 14. The ship by agreement put into the port of Halifax for examination by the English authorities, and arrived at Christiania March 10. Text of note: *Current History*, 5:972; *N. Y. Times*, Feb. 4, 1917; March 11, 1917.
- 3 GERMANY — UNITED STATES. The Secretary of the Navy ordered the commanders of the various navy yards to take such steps as might be necessary for the safety of interned German ships. The crews of the *Kronprinz Wilhelm* and the *Eitel Friedrich* were placed in isolation barracks. The Prize crew of the *Appam* was taken off and the ship placed in the custody of the U. S. Marshal. The *Kronprinzessin Cecile*, owing to civil suits against her owners still pending nominally in the possession of the U. S. Marshal, was taken actual possession of. Police guards were placed on all piers where German and Austrian vessels, some 91 in number, were interned. In anticipation of seizure by the United States all interned ships had been so badly damaged as to be rendered useless. At Charleston, S.C., the German freighter *Liebenfels* was scuttled in the harbor. German and Austrian ships in the Canal Zone and Philippines were taken possession of by the Government. On Feb. 4 the United States issued a statement that it was not the intention of the government to seize the ships but merely to take steps to prevent interference with navigation. Statement in explanation of the seizures was made Feb. 7, by the Secretary of War. Text: *Current History*, 5:978; *N. Y. Times*, Feb. 4, 8, 1917.
- 3 GERMANY — UNITED STATES. The United States demanded the release of 63 Americans captured on British vessels in the South Atlantic and held as prisoners. On Feb. 28 four of these were released, the remainder being held in quarantine until March 8, when they were released and sent to Switzerland. *N. Y. Times*, March 2, 9, 1917.

- 4 UNITED STATES. Instructions issued to American representatives in neutral countries to announce the breaking off of diplomatic relations with Germany. Text: *Current History*, 5:582; *N. Y. Times*, Feb. 4, 1917.
- 4 GERMANY. The American Ambassador at Berlin informed the United States that Germany had announced its intention to treat all armed merchantmen as warships. *N. Y. Times*, Feb. 7, 1917.
- 5 MEXICO—UNITED STATES. The last of the American forces were withdrawn from Mexico. *N. Y. Times*, Feb. 6, 1917.
- 5 GERMANY—UNITED STATES. The American Ambassador to Germany, Mr. Gerard, asked for and received his passports. Mr. Gerard, with his party, including 110 Americans in addition to his family and staff, left Berlin February 10, for Switzerland. *N. Y. Times*, Feb. 6, 11, 1917.
- 5 NICARAGUA—UNITED STATES. The Nicaraguan Congress by a majority of 14 adopted a resolution urging the President of Nicaragua to obtain the withdrawal of American forces from Nicaragua. *Washington Post*, Feb. 6, 1917.
- 5 MEXICO. The new constitution of Mexico was promulgated. Text: *Mexican Review*, March 1917, p. 2.
- 5 UNITED STATES. The President issued a proclamation barring the transfer of American ships to foreign registry. Text: *N. Y. Times*, Feb. 6, 1917.
- 6 BRAZIL—GERMANY. The Government of Brazil replied to the German notification of the new submarine policy, protesting against the same. Text: *Current History*, 5:985; *N. Y. Times*, Feb. 11, 1917.
- 6 SPAIN—GERMANY. The Government of Spain replied to the German notification of the new submarine policy, protesting against the same. Text: *Current History*, 5:983.
- 7 THE CALIFORNIAN. The British transatlantic steamer *Californian* sunk without warning. *N. Y. Times*, Feb. 8, 1917.
- 7 GERMANY—UNITED STATES. The Senate, by a vote of 78 to 5, indorsed the President's action in breaking off diplomatic relations with Germany. *N. Y. Times*, Feb. 8, 1917.
- 8 GERMANY—UNITED STATES. The German Foreign Office requested Ambassador Gerard to sign a protocol reaffirming the treaties of 1799 and 1828, parts of which were abrogated by the

Seamen's Act, approved March 4, 1915. This Mr. Gerard refused to do. *N. Y. Times*, Feb. 12, 1917.

- 8 SWEDEN — UNITED STATES. Sweden replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. Text: *N. Y. Times*, Feb. 9, 1917.
- 8 URUGUAY — GERMANY. Uruguay replied to the German notification of the new submarine policy, protesting against the same. *N. Y. Times*, Feb. 9, 1917.
- 8 PERU. Replied to the German notification of the new submarine policy, protesting against the same. Summary: *Current History*, 5:986.
- 9 ARGENTINE REPUBLIC. Replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. *Washington Post*, Feb. 10, 1917.
- 9 CHINA. The Chinese cabinet indorsed the action of President Wilson in breaking off diplomatic relations with Germany. *N. Y. Times*, Feb. 11, 1917.
- 10 PERU. Replied to the American note of Feb. 5, 1917, announcing the breaking off of diplomatic relations with Germany. Summary: *Current History*, 5:986.
- 10 SWITZERLAND. Replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. Summary: *N. Y. Times*, Feb. 12, 1917.
- 10 GERMANY — UNITED STATES. A Manila firm levied on 31 German vessels held in Cebu, Manila, Iloilo, to recover half a million pesos for maintenance of the vessels and crews since the outbreak of the war. The firm, The Behnmeyer Company, of Manila, is a fiscal agent for the German Government. *N. Y. Times*, Feb. 11, 1917.
- 10 GERMANY — UNITED STATES. The American Ambassador, James Gerard, left Germany for Switzerland, accompanied by consular officers and certain other Americans. *N. Y. Times*, Feb. 11, 1917.
- 10 GERMANY — UNITED STATES. The Swiss Minister to Washington presented a proposal from Germany for an interpretative and supplemental agreement as to Art. 23 of the treaty of 1799. Text issued by the Dept. of State.
- 10 GERMANY — UNITED STATES. The Swiss Minister, Dr. Ritter, Chargé of German affairs in the United States, presented a memorandum to the Department of State to the effect that

- Germany was willing to negotiate formally or informally with the United States provided that the commercial blockade against England was not broken. *Text issued by the Dept. of State; N. Y. Times*, Feb. 13, 1917.
- 11 CHINA. Replied to the American note of Feb. 5, announcing the breaking off of diplomatic relations with Germany. Text: *Current History*, 5:987.
- 11 CUBA: Insurrections broke out in several places in Cuba, due to the disputed result of the Presidential elections in November, 1916. On Feb. 10 the United States sent note to the Cuban Government setting forth the policy of the United States toward that government, and on Feb. 13 and 20 further notes were sent. General Gomez, one of the leaders of the insurrection, was captured. On March 8, 400 American marines landed and took charge of Santiago de Cuba, where they remained until order was restored and government troops assumed control. Texts of notes: *N. Y. Times*, Feb. 13, 15; March 9, 16, 1917; this Journal, editorial, p. 419.
- 11 SWITZERLAND. Replied to the German notification of the new submarine policy, protesting against the same. Text: *Current History*, 5: 984.
- 12 GERMANY — UNITED STATES. The United States replied to the memorandum submitted by the Swiss Minister on February 10, 1917, and accepted the offer to negotiate differences, provided the German proclamation relative to submarine operations of Jan. 31 were withdrawn. *Text issued by the Dept. of State; N. Y. Times*, Feb. 13, 1917.
- 12 MEXICO. Sent notes to neutrals proposing an embargo on food-stuffs and munitions of war to belligerents. Text: *N. Y. Times*, Feb. 13, 1917; *text issued by the Dept. of State*.
- 13 DENMARK, NORWAY AND SWEDEN. Identic notes were handed the German ministers to these countries protesting against the new German submarine policy. Summary: *Current History*, 5:986.
- 13 GREAT BRITAIN. British Admiralty issued revised notice relative to dangerous mined areas in the North Sea. The first British notice of the mining of the North Sea was issued Oct. 3, 1914, and confirmed Oct. 9, 1914, by Notice to Mariners No. 1626 of 1914. *London Gazette*, No. 28935. The second notice was issued Nov. 3, 1914 by Notice to Mariners No. 1706 of 1914. *London Gazette*, No. 28965. *Text issued by the Dept. of State*.

- 14 GERMANY. The German Ambassador, Count von Bernstorff, sailed from New York on the Scandinavian-American Liner *Frederik VIII*, with his staff, including German consuls. The ship put in at Halifax for examination and arrived in Copenhagen March 14, 1917. *Current History*, 5:972; *N. Y. Times*, March, 1917.
- 14 AUSTRIA — UNITED STATES. The *Lyman S. Law*, an American sailing schooner with cargo of lumber, was sunk by an Austrian submarine off Sardinia. *N. Y. Times*, Feb. 15, 1917.
- 16 GREAT BRITAIN. Order in Council issued relative to the examination of neutral ships. *London Gazette*, No. 29955. Text: *London Times (Weekly ed.)*, March 2, 1917.
- 16 FRANCE — SPAIN. French decree promulgating the accord signed Dec. 29, 1916, fixing the judicial relations in Morocco. French text: *J. O. 1917*:1375.
- 17 GERMANY. The captain of the *Kronprinzessin Cecilie* stated in court that the boat was disabled on orders from the German Embassy. *N. Y. Times*, Feb. 18, 1917.
- 19 BOLIVIA. Replied to the Mexican note relative to an embargo on foodstuffs and munitions of war, dated Feb. 12, 1917. Summary: *N. Y. Times*, Feb. 20, 1917.
- 19 UNITED STATES. Replied to the Mexican note relative to an embargo on foodstuffs and munitions of war, dated Feb. 12, 1917. *N. Y. Times*, Feb. 20, 1917.
- 25 GERMANY. The Cunard steamer *Laconia* sunk by German submarine. *N. Y. Times*, Feb. 26, 27, 28, 1917.
- 26 UNITED STATES. The President addressed Congress asking authority to arm merchant vessels for defense. Text: *Independent*, 89:396; *N. Y. Times*, Feb. 27, 1917.
- 26 ARGENTINE REPUBLIC. Reported that Argentina was attempting to bring about joint action by Latin America in offering mediation in the European war. *N. Y. Times*, March 4, 1917.
- 28 GERMANY — UNITED STATES. Four of the *Yarrowdale* prisoners who had not been confined in the quarantine camp were released. *N. Y. Times*, March 2, 1917.

March, 1917.

- 1 CHINA. Reported that the French Minister and the Belgian Chargé representing the Entente Allies have invited China to

- enter the war, promising a remission of the Boxer indemnity and a revision of the tariff as inducements. *N. Y. Times*, March 2, 1917.
- 1 CHINA. Wu ting Fang resigned as Foreign Minister, *N. Y. Times*, March 2, 1917.
 - 1 GERMANY — MEXICO. In response to a Senate Resolution the President of the United States informed the Senate that the government was in possession of evidence establishing the authenticity of the note addressed to the German Minister to Mexico by his government, January 19, 1917, relative to the entry of Mexico into war with the United States in event war was declared between Germany and the United States. The President stated that in the opinion of the Secretary of State it was incompatible with the public interests to give any further information at the present time. Text: *N. Y. Times*, March 2, 1917.
 - 2 PORTO RICO. The President approved the Act of Congress granting citizenship to Porto Ricans. *Public Act 368, 64th Congress, Second Session.*
 - 2 FRANCE — SWEDEN. Ratifications exchanged of a treaty for the reciprocal protection of trade marks signed Jan 31, 1916. *J. O.*, 1917: 2213.
 - 2 AUSTRIA-HUNGARY — UNITED STATES. Austria-Hungary replied to the American note of Feb. 18, inquiring the attitude of Austria on the submarine question. *Text issued by the Dept. of State; N. Y. Times*, March 7, 1917.
 - 3 MEXICO — UNITED STATES. Hon. Henry P. Fletcher, appointed American Ambassador to Mexico Feb. 25, 1916, presented his credentials to the Mexican Government. *N. Y. Times*, March 4, 1917.
 - 4 UNITED STATES. The United States Senate adjourned without voting upon Senate Bill 8322 authorizing the President to arm American merchant vessels. A manifesto, signed by 68 Senators, was issued stating that they favored the measure and would vote for it if a vote could be obtained. Text: *N. Y. Times*, March 4, 1917. A similar bill passed the House of Representatives by a vote of 403 to 13. The President issued a statement to the public on the subject and recommended that the rules of the Senate be amended so as to curtail debate when desirable. Text: *N. Y. Times*, March 5, 1917.

- 6 THE APPAM. The United States Supreme Court rendered an opinion sustaining the decision of the lower court restoring the ship to the British owners and the cargo to the custody of the master. See this JOURNAL, page 443.
- 6 WERNER VON HORN. The appeal of Werner von Horn, the German reservist lieutenant who attempted to blow up the International Bridge near Vanceboro, Vermont, in 1915, failed in the Supreme Court on a technical ruling as to a right to appeal. Horn, when arrested, claimed that he intended to blow up the bridge at McAdam, N. B., and therefore he was not amenable to American law. *N. Y. Times*, March 7, 1917.
- 8 RUSSIA. Protested to Germany, Austria, Bulgaria and Turkey against violations of the laws of war. Summary: *N. Y. Sun*, March 9, 1917.
- 8 CUBA — UNITED STATES. 400 marines from American warships landed and took charge of Santiago de Cuba at the request of the governor. *N. Y. Times*, March 9, 1917.
- 8 GERMANY — UNITED STATES. The *Yarrowdale* prisoners, whose release was asked by the United States, Feb. 3, 1917, were released from quarantine and sent to Switzerland. *Washington Post*, March 9, 1917.
- 10 GERMANY — UNITED STATES. The Swiss Minister presented a protest from Germany against the arming of merchant vessels. *Washington Post*, March 11, 1917.
- 10 ALBANIA. Austria declared Albania autonomous as an Austrian protectorate. *Independent*. 89:478.
- 11 MEXICO. General elections held. General Carranza elected President. He was inaugurated May 1, 1917. *Ind.* 89: 483; *N. Y. Times*, May 2, 1917.
- 12 UNITED STATES. The United States sent a statement to the foreign missions in Washington to the effect that in view of the announcement of Germany, Jan. 31, 1917, that all ships, including those of neutrals, met within certain zones would be sunk, without visit and search and without regard for the safety of persons on board, the United States had determined to place upon all American merchant vessels sailing through the barred zones a guard for the protection of the vessels and the lives of the persons on board. *N. Y. Times*, March 13, 1917; text issued by the Dept. of State.

- 12 **TURKEY — UNITED STATES.** Turkey has accepted temporarily the four American consuls recently transferred from Germany, under the old form of ex-equatur empowering consuls to act as extraterritorial judges in cases involving American citizens. *Washington Evening Star*, March 13, 1917.
- 14 **CHINA — GERMANY.** China severed diplomatic relations with Germany and handed the German Minister his passports. German ships in Chinese ports were seized. The Netherland legation in Peking took charge of German affairs in China and the Danish Legation in Berlin took charge of Chinese affairs in Germany. *N. Y. Times*, March 15, 1917.
- 15 **RUSSIA.** The Czar of Russia, Nicholas II, abdicated at midnight, on behalf of himself and his son the heir apparent Grand Duke Alexis, in favor of his brother Grand Duke Michael. *N. Y. Times*, March 16, 17, 1917.
- 16 **RUSSIA.** Grand Duke Michael abdicated the Russian throne at 2:30 P.M. This ends the Romanoff dynasty. *N. Y. Times*, March 17, 1917.
- 16 **RUSSIA.** The Provisional Government issued an appeal to the Russian people. The Provisional Government consists of:
Premier: President of the Council and Minister of the Interior: Prince George E. Ivoff.
Foreign Minister: Professor Paul N. Milukoff, of Moscow University.
Minister of Public Instruction: Professor Manuiloff of Moscow University.
Minister of War and Navy—ad interim: A. J. Guchkoff, formerly President of the Duma.
Minister of Agriculture: M. Ichingareff, Deputy from Petrograd.
Minister of Finance: M. Tereschtenko, Deputy from Kiev.
Minister of Justice: M. Kerenski, Deputy from Saratoff.
Minister of Communications: N. V. Nekrasoff, Vice President of the Duma.
Controller of State: M. Godneff, Deputy from Kazan. *N. Y. Times*, March 16, 1917.
- 16 **UNITED STATES — MEXICO.** The United States sent a further reply to the Mexican note relative to an embargo on foodstuffs

- and munitions of war dated Feb. 12, 1917. *N. Y. Sun*, March 17, 1917; text issued by the *Dept. of State*.
- 17 UNITED STATES — MEXICO. Mexico replied to the American note of March 16, 1917. Summary: *N. Y. Times*, March 18, 1917.
- 19 JAPAN — PORTUGAL. Reported that Japan had bought from Portugal the Island of Macao. This island lies on the west side of the Canton River about 75 miles southeast of Canton and 35 west of Hongkong, and has a population of about 80,000. *N. Y. Times*, March 20, 1917.
- 17 UNITED STATES — GERMANY. The American steamship the *City of Memphis*, bound from Cardiff to New York in ballast, sunk by German submarine. *N. Y. Times*, March 19, 1917.
- 16 UNITED STATES — GERMANY. The American steamship the *Vigilancia* sunk by German submarine. *N. Y. Times*, March 19, 1917.
- 17 UNITED STATES. The American tanker *Illinois*, London to Port Arthur, sunk by German submarine. *N. Y. Times*, March 20, 1917.
- 19 CHINA — GERMANY. Chinese troops took over the German concessions of Hankow and Tien Tsien. *Washington Post*, March 21, 1917.
- 20 UNITED STATES. The War Risk Insurance Bureau announced that it would insure practically all forms of contraband except arms and ammunition. *N. Y. Times*, March 21, 1917.
- 20 GERMANY — UNITED STATES. The United States replied to the note of the Swiss Minister proposing an interpretative and supplementary agreement to Article 23 of the treaty of 1799. *Text issued by the Dept. of State*.
- 20 GREECE. The Entente Allies raised the blockade of Greece and the ministers of these powers returned to Athens. *Washington Post*, March 21, 1917.
- 20 GERMANY — UNITED STATES. The United States replied to the note of the Swiss minister proposing on behalf of Germany an interpretative and supplementary agreement as to Article 23 of the treaty of 1799, refusing the proposed agreement. *Text issued by the Dept. of State*.
- 21 UNITED STATES. The President called Congress to meet in extra session on April 2, 1917, instead of April 16, as previously called. *N. Y. Times*, March 22, 1917.

- 21 UNITED STATES — RUSSIA. The United States recognized the Provisional Government as the *de facto* government of Russia. *N. Y. Times*, March 22, 1917.
- 21 UNITED STATES — GERMANY. The American steamer *Healdton*, proceeding through the "safe zone" for Rotterdam by way of Bergen, with petroleum, torpedoed without warning, *N. Y. Times*, March 23, 1917.
- 22 GERMANY. Declared a danger zone in the Arctic Ocean including east of 24° east longitude and south of 75° north latitude. *N. Y. Times*, March 24, 1917.
- 23 GREAT BRITAIN. Declared an extension of the danger zone in the North Sea. Text: *N. Y. Times*, March 24, 1917.
- 25 GERMANY. Announcement made of a new barred zone in Arctic waters. Text: *N. Y. Times*, March 26, 1917.
- 30 GERMANY — NORWAY. Norway protested against the German blockade of Norwegian northern ports announced March 26, 28. *N. Y. Sun*, March 31, 1917.
- 30 POLAND. The Russian Provisional Government issued a proclamation formally announcing that Poland shall decide for itself its form of government. *Washington Post*, March 31, 1917.
- 30 GERMANY — UNITED STATES. Germany replied to the charge that Germany had violated the Prussian treaties of 1785, 1799 and 1828. *Text issued by the Dept. of State*.

INTERNATIONAL CONVENTIONS

ADHESIONS, RATIFICATIONS, DENUNCIATIONS

INDUSTRIAL PROPERTY. Washington, June 2, 1911.

Adhesion:

Sweden. *J. O.*, 1917:895.

MARRIAGE, GUARDIANSHIP, ETC. The Hague, July 17, 1905.

Denunciation:

France, Jan. 20, 1917. *J. O.*, 1917:616.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN¹

Contraband of war. Proclamation making certain additions to and amendments in the list of articles to be treated as. St. R. & O. 1916, No. 683. 1½d.

Relief of allied territories in the occupation of the enemy. Correspondence respecting the. Cd. 8348. 4d.

Submarines, belligerent, Treatment of in neutral waters. Memorandum communicated by the Allied Governments to the governments of certain neutral maritime states respecting. Cd. 8349. 1d.

Trading with the enemy. Order in Council, Sept. 29, 1916, further varying the Statutory List contained in Proclamation No. 3. No. 9. 1½d.

Treaties between the United Kingdom and foreign states. Accessions, withdrawals, etc. Treaty Series, 1916, No. 4. 1d.

Typhus epidemic at Gardelegen during the spring and summer of 1915. Report by the government committee on the treatment by the enemy of British prisoners of war. Cd. 8351. 2d.

UNITED STATES²

Arbitration. Agreement between Italy and United States, extending duration of convention of March 28, 1908; signed Washington, May 28, 1913, proclaimed April 15, 1914. [Reprint.] Treaty Series 588. [English and Italian.] *State Dept.*

Birds. Convention between United States and Great Britain, for the protection of migratory birds; signed Washington, Aug. 16, 1916, proclaimed Dec. 8, 1916. 6 p. Treaty Series 628. *State Dept.*

Brazil. Treaty for advancement of peace between United States and, signed Washington, July 24, 1914, proclaimed Oct. 30, 1916. 6 p. Treaty Series 627. [English and Portuguese.] *State Dept.*

¹ Official publications of Great Britain may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

² When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Chinese in United States. Treaty, laws, and rules governing admission of Chinese. Edition of October 27, 1916. 48 p. *Immigration Bureau*. Paper, 5c.

Commercial convention between United States and Cuba, signed Havana, Dec. 11, 1902, proclaimed Dec. 17, 1903. [Reprint with changes, 1916.] 12 p. Treaty Series 427. [English and Spanish.] *State Dept.*

Foreign Relations of the United States. List of Government publications for sale by the Superintendent of Documents. November, 1916. 40 p. (Price list 65, 2d ed.)

Immigration. Publications relating to naturalization, citizenship, Europeans, Japanese, Chinese, Negroes, for sale by Superintendent of Documents. November, 1916. 18 p. (Price list 67.)

Immigration and emigration. Conference report to accompany H. R. 10384. Jan. 8, 1917. 6 p. H. rp. 1266.

———. Jan. 13, 1917, 5 p. H. rp. 1291.

———. Report to accompany H. R. 10384 to regulate immigration of aliens to, and residence of aliens in, United States. Dec. 7, 1916. 20 p. S. rp. 352, 64th Cong., 1st sess. *Immigration Committee*.

Immigration bill, Message from President of United States transmitting his veto on. 1917. 3 p. H. doc. 2003.

International High Commission, Report of United States section on first general meeting of commission held at Buenos Aires, April 3-12, 1916. 41 p. H. doc. 1788. Paper, 5c.

International relations, United States and the Orient. Hearings on H. R. 16661 to provide for commission on relations between United States and the Orient; statement by Jane Adams, and others, Dec. 12, 1916. 12 p. *Foreign Affairs Committee*.

Jaeger, Jacob, alias Jacob Hoffman. Report relative to detention of, by Canadian Government, Dec. 6, 1916. 4 p. H. doc. 1447. *State Dept.*

Maritime Canal Company of Nicaragua. Report of, Dec. 2, 1916. 2 p. H. doc. 1428.

Mexican Question. By President Wilson. (From *Ladies' Home Journal*, October, 1916.) 4 p. *State Dept.*

Military law. Revision and codification of military laws of United States, report relative to progress of work. Dec. 6, 1916. 2 p. S. doc. 560. *War Dept.*

Panama Canal. Annual report of the Governor, 1916. 637 p. 3 pl. 58 p. of pl. and portfolio of 48 pl. and 4 maps. Paper, \$1.20. H. doc. 1498.

———. Executive order relating to motor vehicles and their operation in roads of Canal Zone. Sept. 5, 1916. 2 p. No. 2451. *State Dept.*

———. Government publications relating to, and to Suez Canal, Nicaragua route, and treaty with Colombia, for sale by Superintendent of Documents. November, 1916. 16 p. (Price list 61, 3d ed.)

———. Slides at. By George W. Goethals. 16 p. [From annual report, 1916.]

Peace, International tribunals to enforce. Hearing before subcommittee on S. J. Res. 131, proposing amendment to Constitution of United States authorizing creation with other nations of international peace-enforcing tribunal or tribunals for determination of all international disputes. Jan. 18, 1917. 30 p. *Senate Judiciary Committee.*

Peace, League for. Address of President of United States delivered to Senate, Jan. 22, 1917. 8 p. S. doc. 685. Paper, 5c.

Porto Rico, Government for. Hearing on S. 1217. pt. 3, 127-151 p. *Pacific Islands and Porto Rico Comm.*

Radio communication. Hearings on H. R. 19350, to regulate. Jan. 11-23, 1917. pts. 1-4, 317 p. *Merchant Marine and Fisheries Committee.*

Supreme Court of the United States. Procedure in case of suit against a State. Hearings on H. R. 18980, Jan. 16, 1917. 36 p. (Serial 49.) *Judiciary Committee. (House.)*

Trade-marks. Convention between the United States and other Powers for protection of, signed Buenos Aires, Aug. 20, 1910; proclaimed Sept. 16, 1916. 28 p. Treaty Series 626. [Spanish, English, Portuguese and French.] *State Dept.*

United States Court for China. Hearings on S. 4014; statement of Wilbur J. Carr, and others, Jan. 10, 1917. 24 p. *Foreign Affairs Committee.*

War Claims, payment of. Report to accompany S. 1878, making appropriation for. Jan. 26, 1917. 20 p. H. rp. 1362. *War Claims Committee.*

West Indies. Message from President of United States transmitting convention between Denmark and United States respecting cession of Danish West Indian Islands to United States, signed New York, Aug. 4, 1916. 8 p. S. Ex. D. 64th Cong., 1st sess. *Senate.*

———. Report of Secretary of State and accompanying papers, recommending appropriation to pay for purchase of Danish West Indies. 1917. 15 p. S. doc. 686. Paper, 5c.

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF
INTERNATIONAL LAW

HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE SHIP "APPAM,"
AND L. M. VON SCHILLING, VICE-CONSUL OF THE GERMAN EMPIRE,
APPELLANTS,

vs.

(650) BRITISH AND AFRICAN STEAM NAVIGATION CO.

Same,

vs.

(722) HENRY G. HARRISON, MASTER OF THE STEAMSHIP "APPAM."

Supreme Court of the United States

March 6, 1917

Mr. Justice DAY delivered the opinion of the court.

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two admiralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, *Appam*, to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the 15th day of January, 1916, the steamship *Appam* was captured on the high seas by the German cruiser, *Moewe*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English government. She had a crew of 160

or thereabouts, and carried a three-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moewe*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moewe*. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the *Appam*. An officer from the *Moewe* said to the captain of the *Appam* that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the *Appam*, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let any one touch the gun on board. The officers and crew of the *Appam*, with the exception of the engine-room force, thirty-five in number, and the second officer, were ordered on board the *Moewe*. The captain, officers and crew of the *Appam* were sent below, where they were held until the evening of the 17th of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the *Moewe*, were ordered back to the *Appam* and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the *Appam* he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The *Appam's* officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the *Appam* as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards, the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the *Appam* after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working

of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

On the night of the capture, the specie in the specie-room was taken on board the *Moewe*. After Lieutenant Berg took charge of the *Appam*, bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam*, pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moewe*, were armed and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moewe*, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the 31st of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States; the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1590 miles from Emden, the nearest German port; from the nearest available port, namely Punchello, in the Madeiras, 130 miles; from Liverpool, 1450 miles; and from Hampton Roads, 3051 miles. The *Appam* was found to be in first class order, seaworthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

Information for the American authorities. The bearer of this, Lieutenant of the Naval Reserve, Berg, is appointed by me to the command of the captured English steamer *Appam* and has orders to bring the ship into the nearest American harbor and there to lay up. Kommando S. M. H. *Moewe*. Count Zu Dohna, Cruiser Captain and Commander. (Imperial Navy Stamp.) Kommando S. M. H. *Moewe*.

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the respondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam*'s cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over \$600,000, are now in the registry of the court, and the unsold portions of the

cargo are now in the custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German Government and our own? Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States?

It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that nation might have adjudicated her status, and, if so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral Power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, *i.e.*, for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and, in a note from His Excellency, the German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice (*Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties*, Department of State, European War No. 3, page 331), and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the *Appam* (*Idem.*, page 333), in which it was stated

Appam is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American Treaty of 1799. Article 21 of Hague

Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to the English.

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such uses were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities of such vessels as to seaworthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, Section 391, and accords with our own practice. Moore's Digest of International Law, Vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, v. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Article 22 provides:

A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This government refused to adhere to Article 23, which provides:

A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, "subject to the reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be

sequestered pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899-1907, Vol. II, pp. 237 *et seq.*

Much stress is laid upon the failure of this government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that Article XIX of the Treaty of 1799 justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, the German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, *supra*, pages 335 *et seq.*); and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows:

The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. [But conformably to the treaties existing between the United States and Great Britain, no vessel (*navire*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible.] (The provision concerning the treaties between the United States and Great Britain is no longer in force, having been omitted by the Treaty of 1828. See Compilation of Treaties in Force, 1904, pages 641 and 646.)

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process, when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another, as contemplated in the treaty and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass v. The Sloop Betsy*, 3 Dallas, 6, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen Genet*, captured as a prize on the high seas the sloop *Betsy* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether

restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheaton, 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

If indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own courts or the courts of the Power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our Courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy. (Page 349.)

... Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws. (Page 354.)

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheaton, 238, 258; *The Estrella*, 4 Wheaton, 298, 308, 9, 10, 11; *La Amistad de Rues*, 5 Wheaton, 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the char-

acter here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the prize court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad, supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed

BOOK REVIEWS

Lord Stowell: His Life and the Development of English Prize Law. By E. S. Roscoe. Houghton Mifflin Co., Boston and New York. 1916. pp. x, 116.

Lord Stowell belongs to that rare company of jurists to whom came the opportunity of determining the form and substance of an important branch of law for an indefinite period in the future. Such an opportunity came to John Marshall to formulate the constitutional law of the United States, and how admirably he met it is known of all men. Not less unique was the work of Lord Stowell in the development of British prize law. To be sure, decisions in prize were in existence which went as far back as the eighteenth century, but most of them were bare statements of results, with no reasoning as to the principle concerned. In this state of the law England became involved in the Napoleonic Wars in which almost every conceivable maritime situation arose and necessitated an examination of the fundamental principles upon which prize law rests. This gave Stowell his opportunity. Appointed Judge of the High Court of Admiralty in 1798, he continued until the downfall of Napoleon to give out from his seat in London a series of reasoned judgments in which he practically created the Anglo-American prize law of the present day, and gave it a coherency and a logical basis which it has ever since retained. In the face of this prodigious achievement, it is one of the anomalies of history that, while forgotten worthies have been forced upon public attention by industrious writers, the great Lord Stowell has thus far escaped an adequate biography.

Mr. Roscoe's book is divided into eight chapters. The first two are biographical and relate the story of Stowell's career as a teacher at Oxford, his friendship with Dr. Johnson, his rapid rise at the bar, and his elevation to the bench. The third chapter is a clear account of the Court of the Admiral and the development of his prize jurisdiction and the rules governing its exercise. The description of the condition of English prize law in 1798, when Stowell became the head of the Admiralty Court, supplies a good background against which to exhibit the

extent of his services in reducing existing rules to systematic form and in adapting principles to new situations. The fourth and fifth chapters deal specifically with some of Stowell's most important judgments, while the sixth is a consideration of the relation between Stowell's decisions and the rules of the Declaration of London. The seventh chapter describes the use made of Stowell's decisions by the British prize courts in the present war, while the last chapter is devoted to Stowell's work in the Admiralty Court on the civil side.

In derogation of an excellent piece of work, it must be said that as a biography the book is entitled to scant consideration, but as an essay on Stowell's work as a prize judge it is worthy of its author's position and high repute. Nowhere will the beginner in prize law find a better introduction to the intricacies of the organization of the British Court of Admiralty than is furnished by Mr. Roscoe's third chapter. The condition of British prize law when Stowell came to the bench and the contrast between its present certainty and systematic form and the *amas de textes si variés*, which even now make up French prize law, are well described. In the consideration of some of the most important of Stowell's decisions a clear conception is given of the quality of Stowell's mind and of the processes by which he reached his conclusions. In short, Mr. Roscoe's book amply explains the authoritative position which Lord Stowell occupies in all British and American prize courts.

LAWRENCE B. EVANS.

International Realities. By Philip Marshall Brown. Charles Scribner's Sons: New York. 1917. pp. xvi, 233.

This is a collection of articles written by Professor Brown since the outbreak of the war, dealing in a constructive way with the general principles of international organization and law. The style is simple and forceful. The subjects considered are of the most vital and profound significance. They are treated in a way to interest equally the student and the average reader.

The first article has the title of the book. He holds that the old conception, still fostered by many publicists, "that international law [is] mainly, if not primarily, concerned with the regulation of war," is an unreality at present, and that "the idea that international law shall regulate war is essentially paradoxical and unsound." He asserts that "the true function of international law is not to govern war, it is to avert

war." This statement is further amplified in a subsequent article (p. 127) by the assertion that "war is the negation of law," and that war and neutrality are "essentially abnormal in character." This proposition, that war and neutrality are abnormal, worked out in its logical ramifications, Professor Brown makes the basis of all the "international realities." In the preface he asserts that the real function of international law is that of "regulating the peaceful relations of states." In this view of international law, he regards the Golden Rule as "in reality, the only safe fundamental principle for international relations." The development of international organization and law, in his opinion, requires the determining of "the specific mutual interests which the nations are prepared to recognize"; the endeavoring, "in a spirit of toleration, friendly concern, and scientific open-mindedness, to formulate the legal rights and obligations which these interests entail;" and the "securing of the most effective agencies for [the] interpretation and enforcement" of the law so formulated.

The next article — on "Nationalism" — is a plea for the recognition of nationality in the fundamental dispositive arrangements of soil and jurisdiction which shall be agreed upon by the nations as the *status quo*. By *nationality* he means "community of interests." In order to utilize nationality as a scientific basis in the creation of new states so as to secure the highest degree of stability possible, he considers it necessary that the new state should have "a population bound together with common sympathies, and adequate to render the state vigorous and self-sufficient; territory including varied resources, with rivers, ports and all natural facilities for economic organization; and a government so representative of the people as to enable them to deal effectively with other nations and fulfil their just obligations." A state so organized, that is, a state in the true and real sense, has, in Professor Brown's opinion, a personality of its own differing in nature from those of the individuals composing it and having different duties and different rights; its function being to secure the individuals composing it in the enjoyment of their rights and in the performance of their duties.

In the article on "The Rights of States" it is asserted that all states are unequal, and that they have no fundamental and equal rights and duties inherent in the mere fact of international personality. That states are unequal no one will dispute. That they have certain fundamental rights and duties as respects which they are all equal is, in the opinion of the reviewer, equally indisputable. Men and nations are

unequal in certain respects when measured by certain standards, and equal in certain other respects when measured by certain other standards. It is necessary in national and international organization to recognize, and to equalize, through artificial rights and duties legislatively determined, the inequalities of men and states, in those respects in which they are in reality unequal. It is also necessary, as the Declaration of Independence and the platform of the American Institute of International Law assert, in national and international organization, to recognize, and to maintain through a declaration of inherent rights, the equality of men and states in those respects in which they are, in reality, equal.

The article on "The Limitations of Arbitration" expresses the conclusion concerning arbitration with which most scholars will doubtless agree, — that arbitration is "to be considered chiefly as an adjunct, or auxiliary of diplomacy," and that it is not "a general panacea for all international ills."

In dealing with "International Administration" Professor Brown would seem to be unduly pessimistic. He asserts that agreement concerning the mutual interests which nations are prepared to recognize must precede organization. As matter of fact, history shows that development of organization and continuous agreement concerning mutual interests go on everywhere simultaneously, and act and react on each other. The only step forward in international organization which he regards as possible is the establishment of a clearing house for the existing international public unions. This ultra-conservative position seems out of harmony with the progressive ideas which pervade the book. The society of nations already is organized to a considerable extent on conciliative and coöperative principles, and there is a growing appreciation of the vast possibilities of effective international direction by the more complete application of these principles. The reviewer would certainly include among the international realities of the present day the widespread perception of these possibilities and the growing purpose of people everywhere to give to the society of nations after the war a real constitution, in which provision shall be made scientifically for coöperative processes and organs capable of exercising efficient advisory direction over those matters which are common to all nations, or are beyond the competency of any one.

In the article on "Ignominious Neutrality," neutrality is regarded as an abnormal condition growing out of the abnormal condition of war.

The conclusion reached by Professor Brown, that it is the duty of each neutral to judge between the belligerents and intervene on the side which to it appears to be just, will doubtless not meet with general approval. Such a view of neutrality would involve any neutral nation adopting it in the balance-of-power system of international control, which Professor Brown very properly deprecates as opposed to any real international organization or law; for probably no neutral ever intervened so as to throw the balance of power in a certain direction except on the alleged ground that it was intervening on the side of "justice." All intervention of individual states is apt to confuse justice with self-interest, and to lead to future wars "to redress the balance of power." Neutrality and intervention are antagonistic ideas. An international law which should require each non-belligerent nation to assume the attitude of a judge, with a view to intervention, would in fact abolish neutrality and substitute for it prospective belligerency. Moreover, the facts leading to wars are so complicated that it is impossible for any nation to form an opinion concerning the rights and wrongs as between belligerents, which can be called, in any true sense, a judgment. After war begins, war-censorship and war-necessity result in the concealment and distortion of facts. The reviewer differs from Professor Brown in the conclusions to be drawn from his premises. The proper conclusion, as it appears to the reviewer, is that, upon the outbreak of war, it is the right and duty of all neutrals, collectively as well as individually, to protect and preserve themselves and to conserve the society of nations. This involves, not forcible intervention, but collective and individual protective action and collective mediation. The experience of the world with intervention has not been sufficiently encouraging to warrant the belief that the international law of the future will impose upon nations not engaged in war, either individually or collectively, the duty of extending the war by forcible intervention. It is more probable that that law, instead of abolishing neutrality, will safeguard and magnify it; recognizing that the first duty of each nation is to its own nationals, and that its only other duty is to the whole society of nations.

In the essay on "The Dangers of Pacifism," the true pacifism is rightly defined as that which holds that peace is attainable through effort directed towards the establishment of an efficient international organization and an international law based on those principles which are the permanent realities of individual and social life. True pacifism, as Professor Brown well says, does not imply inertness; on the contrary,

it involves thorough preparedness on the part of each nation and its citizens to perform their just international, national and individual duties, and to secure their just international, national and individual rights.

"Pan-Americanism" is studied as typical of real internationalism. It is through the wholly voluntary and coöperative system of organization that the nations of the world are, in Professor Brown's opinion, to be brought into unity.

The final article on "The Substitution of Law for War," like that on "Ignominious Neutrality," frankly accepts war as an abnormal condition, justifiable in some cases only by the same course of reasoning by which organized communities justify self-redress by individuals. The underlying principles of self-redress by individuals are that it is justifiable when the circumstances of the particular case are such that the community could not possibly furnish a means of redress, or when the community could have provided a means of redress and has neglected to do so.

The last article leaves us heavily weighed down under the burden of the "international realities," but with hope of a result from great and long-continued labors. Peace, as Professor Brown shows, means the slow and gradual substitution of facilities for community redress of national injuries, instead of the existing facilities for self-redress by war. The task is "stupendous," but within the limits of human capacity.

The book is, in the opinion of the reviewer, one of the most notable which the Great War has produced. Its teaching reminds one of the conscientious and reasonable abolitionist argument against slavery which finally prevailed. It sweeps away the unstable compromises of the text-writers who usually devote the greater part of their attention to "the laws of war," by asserting that war is incapable of regulation in the ordinary sense, and is to be "regulated" only as disease is "treated" — that is, with a view to its abolition at the earliest possible moment.

It is a fact of consequence that a professor of international law in Princeton University, a diplomat of wide experience, should thus commit himself to the war-abolitionist party. If it be true that it is an international reality that war is abnormal, it means that the war-abolitionist party of the world, whose platform is that war is an unnecessary evil, has already acquired supremacy over the combined forces of the war-

enthusiast party, whose platform is that war is a necessary good, and of the war-fatalist party, whose platform is that war is a necessary evil.

The inventions which this war has evolved have apparently strengthened national means of defense and weakened national means of external domination. If the war shall prove that these inventions have abolished domination on sea or land, or in the air, by any one nation, this will mean that national ambitions will no longer find outlet in the control of external communities for national benefit, and that such ambitions must hereafter be directed toward the control of the natural forces of the universe for national and international benefit. Once the possibility of national domination ceases, the desire for international fellowship will doubtless operate so effectively that all war will in fact be civil war, and thus abnormal.

But even if it shall prove that these inventions have not abolished the possibility of national domination of external communities, the experiences through which the world is passing must have swelled the ranks of the war-abolitionists everywhere; and it is reasonable to believe that the world after the war will accept, as one of the fundamental international realities, the proposition to which Professor Brown commits himself, that war is abnormal and an unnecessary and remediable evil.

A. H. SNOW.

Les Traités Fédéraux et la Législation des États aux États-Unis. Paris: Librairie Générale de Droit et de Jurisprudence. pp. 228.

Mr. Bates has attempted a difficult task in seeking to disentangle from our *daedalus* of decisions the real relation of the treaty-making power to the other branches of the government. He has fortunately applied to this intricate subject the lucid and precise thinking of the trained French mind, and the result has been a clear, concise, comprehensible monograph on this difficult subject.

In order to make the situation intelligible to the foreign mind he begins with an historical *résumé* of the situation and explains the lamentable breakdown of American treaties during the period of Confederacy. This he follows by an excellent discussion of the relations between the Federal Government and the States, and the difficulties which, by reason of this relationship, arise regarding treaties dealing with matters covered by State legislation.

The conflict between State statutes and treaties regarding the

rights of foreigners to transfer and inherit property are set out fully, and Dr. Bates has admirably grasped the essential point of the numerous decisions of the Supreme Court, stating them briefly, but accurately. The greater part of his monograph is taken up with an analysis of these decisions. An entire chapter, for instance, is given to the conflict between treaties and State legislation regulating the administration of justice, and the much mooted question of consular rights of administration is ably discussed.

For an American lawyer with the cases before him and our various works on the subject, especially Butler's complete and able volumes on the treaty-making power, this monograph does not furnish new light. It should, however, have a very useful *rôle* in explaining to foreign jurists and thinkers the difficulties inherent under our constitutional system in respect to treaties. The possibility that treaties may be declared unconstitutional or may be in practice overridden by State statutes is difficult of understanding by the Continental jurist.

It has always seemed to the writer that Hamilton was correct in believing that treaties, like the Constitution itself, should be placed beyond the legislative power to repeal by subsequent statute, and should in reality be "the supreme law of the land." An unconstitutional treaty seems almost a contradiction in terms, yet it is the settled law of the United States that a treaty at any time may be overridden by a subsequent statute. This often places our foreign affairs at the mercy of the temporary majority in Congress. A recent Shipping Act, for instance, practically abrogated some eighteen treaties, and produced great confusion in our shipping relations with the foreign countries affected.

It would seem difficult to find any remedy without constitutional amendment. It may be, however, that as the United States emerge from their supposed isolation, our legislators will pay greater heed to treaty obligations and hesitate to pass laws which may abruptly and unjustly affect them.

The action of Congress in regard to the Chinese Treaty, which action was sustained as valid by the Supreme Court, would, in the case of a powerful and aggressive nation, easily have led to war. It is well that a publicist of standing should have made our difficulties clear to the foreign world.

FREDERIC R. COUDERT.

War: Its Conduct and Legal Results. By T. Baty and J. H. Morgan.
London: John Murray. 1915. pp. xxviii, 578. 1016 net.

The scope and importance of this volume are indicated by the main divisions: the Crown and the Subject, the Crown and the Enemy, the Crown and its Treaty Obligations, the Subject and the Enemy, and the Crown and the Neutral. The chapters dealing with the effects of the present war on British subjects and other persons within British jurisdiction are the work of Professor Morgan, while those dealing with questions of international law are the work of Dr. Baty. The authors state, however, that the volume was prepared in close coöperation and that they are jointly and severally responsible for it as a whole. The appendix contains a valuable collection of documents illustrating the text.

Under the head of The Crown and the Subject, Professor Morgan gives a full analysis of the acts and regulations adopted for the defense of the realm, particularly of the Defense of the Realm Consolidation Act of November 27, 1914. The necessity for the enactment of such a stringent measure is denied, and the regulations adopted under it are vigorously assailed by the writer, who comments on the fact that not a single member of the House of Commons criticised the bill during its progress through the House. In the Lords, however, it was opposed by Lord Halsbury and Lord Bryce.

It is astonishing to what an extent the constitutional rights of Englishmen have been suspended as a result of the wholly unprecedented condition in which England finds herself to-day. Professor Morgan asserts that,

For the first time in England for at least two hundred and fifty years, a civilian may be sentenced to death without trial by jury. . . . Considering that the king's courts are still sitting, that the king's writ runs throughout the realm, and that juries can be, and are being, empanelled every day, we think this subjection of the lives of private citizens to military law is entirely unjustified. The death penalty, once inflicted, is irrevocable. — (pp. 110-111.)

Again (p. 112) he says:

Certainly never in our history has the Executive assumed such arbitrary power over the life, liberty, and property of British subjects. The net of restriction is now so finely woven, so ingeniously designed, that it enmeshes every activity of the citizen.

After citing a number of instances in which arbitrary power may be employed, he adds:

The private citizen is placed under the absolute orders of any major holding His Majesty's commission. The military authority issues these orders, and the military authority decides whether the citizen has offended against them. To challenge these Regulations in a court of law will, as we have seen, be often difficult and sometimes impossible. To "appeal" against the sentence of a court-martial to a civil court may be attempted by a writ of *certiorari*, but precedents are not encouraging. We must leave the reader to judge for himself whether this "Parliamentary despotism," which recalls nothing so much as the kind of legislation hitherto exclusively reserved for uncivilised Protectorates, is either necessary or wise.

In view of the expressions just quoted, it would appear that freedom of speech was one of the rights of which Englishmen had not been deprived at the time this book was written.

The sea policy of England had not been fully developed when this book was published. The chapters written by Dr. Baty, therefore, do not discuss the practical application of the measures adopted by Great Britain in restraint of neutral trade. Most of the vital points of British policy are, however, strongly condemned in advance. On "military areas," for example, Dr. Baty says (pp. 224-225):

We attach no special importance to the declaration issued by the British Admiralty, affecting to make the North Sea "a military area." All that such a declaration can effect is to put neutrals on guard; to inform them that their presence in such waters will be regarded as suspicious, and that, when navigating there, they will be more than ordinarily liable to charges of contraband trading or of unneutral service. Probably no more is meant.

The doctrine of continuous voyage as laid down by the Supreme Court of the United States in the Civil War cases is strongly condemned, and the assertion is made that the attempt of the United States to apply the doctrine of continuous voyage to blockade has been "universally reprobated, and finds no sanction in the Declaration of London (Arts. 18, 19)." Summing up the policy adopted soon after the outbreak of the war by Great Britain in regard to contraband and continuous voyage, he says:

This may be beneficial to Great Britain in the immediate present. It is our duty only to point out that it goes far beyond what neutrals have tolerated in the past and may be calculated to drive them into the arms of a belligerent. (p. 379.)

Another policy which Great Britain has pursued is condemned in even stronger terms (p. 391):

We should add, with the strongest reprobation, that by Art. 47 of the Declaration of London, a member of the belligerent armed forces may be forcibly taken from on board a neutral merchant ship. Since the foreign captor cannot be contradicted, this opens up the way to the most violent abuses, and is in conflict with all that has been maintained by America and Great Britain in the controversies regarding impressment and the *Trent* respectively. There is little doubt, as Dr. T. A. Walker says, that Britain was wrong in 1807 and right in 1862. The inviolability of the neutral flag, except under due sentence of a prize court, cannot be too firmly maintained. It is here set at naught in a quite anachronistic fashion.

It would thus appear that Great Britain has little legal ground to stand on. It is interesting to note that the full development of British maritime policy has not shaken Dr. Baty's convictions, for in this JOURNAL for January, 1916, he criticises this policy with great frankness and severity. The reader lays down the volume with the conviction that laws, national and international, are made for peace and that war is anarchy. *Inter arma leges silent.*

JOHN H. LATANÉ.

International Cases, Arbitrations and Incidents illustrative of International Law as Practised By Independent States. Volume II. War and Neutrality. By Ellery C. Stowell and Henry F. Munro. Boston: Houghton Mifflin Company: pp. xvii, 662. \$3.50 net.

There is no date on the title page, an omission to be regretted, but the date of the preface is "November 1916."

The work is one of 662 pages and it is the second volume in a series. The preface sets out as follows the advantages thought to appertain to a collection of this sort made while war is in progress.

In time of war acts of governments and those for whom they stand responsible are to be judged upon the facts as they appear at the time, especially when the government concerned makes no effort to furnish the evidence which it has at its disposal or which it might procure. Hence it is that a collection of cases to serve as a basis for the study of the law of war and neutrality ought to be made *flagrante bello*. With the return of peace any incident of a controversial nature can be subjected to a *post mortem* examination, studied and dissected, but it can no longer serve as a living example.

With this thought in view we have endeavored to make a full collection of the material relating to the war in course and take advantage of the moment which will not return to make "the volume a wartime publication."

This intention of the learned editors gives character to the whole work. The leading older cases and examples are largely omitted. The current cases and diplomatic declarations and correspondence are extensively transcribed and included. The result is that while the view of the authorities is by no means comprehensive and compendious, yet it is modern and contemporaneous and gives much of high value not yet accessible in the standard works.

Many subjects take on new importance through practices and inventions which are novel, or, if not wholly so, have been greatly amplified in the present war.

To illustrate the predominance of new material, under the title "Occupation," which includes 19 references, 14 have to do with the present war and five with those of the past. Of ten references under the title "The Status and Treatment of Noncombatants, Nonintercourse, Guides, Human Screens, Levees en Masse," all ten pertain to the present war.

Among the many precedents and practices of novel extensions, at least in modern war, which are treated, is the expulsion or internment of alien enemies at the outbreak of the war, a doctrine of vast import to us if we become parties belligerent. Among those incidents or expedients included and illustrated by recent events or themselves important acts in the great struggle, the following are conspicuous: "The Use of Asphyxiating Gases; The *Lusitania*; Prisoners Used to Screen a Pontoon Bridge; The Execution of Captain Fryatt; Belgian Protest regarding the Removal of Railways; Illegal Requisition of Stud Horses, Mares and Colts; A System of General Terrorization; Poisoning Wells; Wireless Messages; The *Deutschland* (dealing with the rights of submarines); The Doctrine of Ultimate Consumption, as a new extension of that of continuous voyage; Neutral Mails; The Black-listing of American Merchants; and many more involving doctrines, perhaps not less important and not less new either in theory or extent and application. No opinion as to the justice and legality or humanity of these doctrines or practices is commonly intimated in this work. The diplomatic statement on one or both sides is quoted, often a transcript of the facts or negotiations is printed from a government publication, the *New York Times*, the *London Times*, or other like source. The student's approval or disapproval is left to such uncolored recitation.

In 1893 Dr. Freeman Snow, of Harvard, published his *Cases and*

Opinions on International Law, and in 1902 Dr. James Brown Scott published his *Cases on International Law* based on Dr. Snow's work. The purpose of Dr. Scott was to derive and exhibit the principles of international law mainly from judicial decisions. In this he was most successful, and his valuable work is yet the leading case-book on this profound subject.

Messrs. Stowell and Munro by no means place the accent on judicial decision. They place it rather on recent practice in the field of war and on diplomatic and official correspondence between belligerent and neutral nations. Their work is of high interest and value, quite indispensable to the rapid investigator in these lines at the present time. It has of necessity, however, a temporary character and will require extended revision after the close of the great war and the adjustment of pending questions.

Professor Stowell was educated at Harvard and in the Universities of Berlin and Paris and in the diplomatic section *Ecole libre des sciences Politiques* of Paris. He was a limited participant at the Second Hague Conference and at the Conference of London. His more extended expression of opinion on the topics included would have been gladly received and valued had his plans permitted. However, the compilation offered is welcome, convenient, and, as has been said, almost essential to those who seek to follow and to try to understand the myriad modifications, extensions, and often perversions which the old rules of international law are suffering in the present desperate belligerency of more than half the world.

CHARLES NOBLE GREGORY.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For Table of abbreviations see Chronicle of International Events, p. 424.]

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KATHRYN SELLERS.

THE PRUSSIAN-AMERICAN TREATIES

I

Few international agreements have received the praise accorded to the treaty entered into between the United States and Prussia in 1785. It was acclaimed at the time as setting a new standard of international conduct, realizing to the fullest extent the humanitarian aspirations of the eighteenth century. To Benjamin Franklin and Frederick the Great have been awarded the credit for this epoch-making document. Franklin's treaty, partly renewed in 1799, was again renewed in part in 1828. After the formation of the German Empire, the treaty of 1828 continued to be recognized as binding, and its provisions continued to serve for the adjustment of commercial relations between Germany and the United States without serious question until the outbreak of the present great European War.

After the Empire was established, the German Foreign Office undertook a systematic negotiation of commercial treaties with the various countries of the world. The old Prussian treaty, however, was considered, by both Germany and the United States, as sufficient for general purposes, and no general commercial treaty was negotiated between the two countries, international agreements between them being limited to the various conventions of narrower scope. The result was that the United States, confronted as a neutral in the world war with vast duties and responsibilities, found itself bound by an obligation, the principal part of which had been negotiated a century and a quarter before the war began. Never before had this treaty been subjected to any serious strain. The portions of the treaty first adopted in 1785 and then renewed in 1799 and in 1828 had received few interpretations. Between 1828 and 1914 the provisions of the treaty never became the subject of dispute between the United States and Prussia or the Empire.

While all works upon the history of American diplomacy have devoted considerable space to the negotiation of the original treaty

of 1785, no attempt, it is believed, has been made to fit the successive agreements into the general scheme of the foreign policy of the United States at the time of the various negotiations. It is proposed in the present article to re-examine the negotiations, to attempt to estimate the influences which produced the original treaty and the modifications of it made in 1799 and 1828, and to trace to their sources the unusual provisions of the treaty of 1785, so long praised as the realization of the ideal in international relations, but recognized since the present war began as provisions giving rise to very serious questions of construction and interpretation.

The authorship of the treaty of 1785 has usually been ascribed to Benjamin Franklin. The effect of the influence of Frederick the Great upon its provisions has been considered, and the general conclusion has been that Frederick adopted for the most part the propositions made by Franklin and his fellow commissioners without much modification, for the reason that the likelihood of either close relationship or serious disagreement between Prussia and the new-born republic of the new world was remote. In order to secure a market for Silesian linens and other products of Prussia, Frederick was willing to agree to practically anything which the American commissioners might suggest. The tradition that Frederick the Great was a friend to the cause of America was demolished some years since by Dr. Paul L. Haworth in an essay entitled "Frederick the Great and the American Revolution."¹ The most detailed account of the German side of the negotiations appeared in a monograph by Dr. Friedrich Kapp entitled *Friedrich der Grosse und die Vereinigten Staaten*, based to a considerable extent upon unpublished materials in the Prussian archives.²

Tracing the lineage of the Prussian treaty of 1828, we go back to that of 1799, from that to 1785. With the exception of the treaty of 1787 with Morocco, the treaty with Prussia was the last of the group of commercial treaties negotiated during the period of the Confederation. It followed the treaty of 1783 with Sweden, which was based upon that with the Netherlands of 1782, and this in turn drew in part upon the treaty of amity and commerce with France of February 6, 1778.

¹ American Historical Review, IX, 460-478.

² Leipzig, 1871.

The French treaty is principally derived from the draft plan of the treaties submitted to the Continental Congress July 18, 1776. This draft plan is the starting point of American commercial treaties, and it has been noted that not only many of the provisions, but much of the phraseology of the draft plan of 1776, are reproduced in the treaties during the Confederation and also in those negotiated after the Constitution was adopted. On June 12, 1776, the Continental Congress selected a committee to prepare a plan of treaties to be proposed to foreign Powers. The committee consisted of John Dickinson, Benjamin Franklin, John Adams, Benjamin Harrison, and Robert Morris.³ Of the drafting committee, only Franklin and Adams afterwards signed treaties for the United States. Franklin signed those with France, 1778, and Sweden, 1783. Adams was one of the signers of the treaty with the Netherlands in 1782, and both Adams and Franklin signed the Prussian treaty of 1785. The committee considered the form of the draft between June 12 and July 18, 1776,⁴ when the plan was submitted in full to the Continental Congress. The extent to which the various members of the committee contributed to the formulation of the draft cannot be determined. Doubtless Franklin had much to do with it, but the original draft of the report is wholly in the writing of John Adams. The plan as finally amended was incorporated in the instructions of the Continental Congress dated September 24, 1776.⁵ These instructions were prepared by James Wilson, who incorporated the amendments made to the plan by the Continental Congress. The question at once arises whence Adams and his associates derived the provisions of their plan of treaties. Adams's manuscript makes reference to the "collection of state tracts" and the "collection of sea laws," and these collections were doubtless made use of in preparing the draft. The exact editions, however, which were used have not been determined; but it is not difficult to indicate the sources from which the plan was derived. The treaties of Utrecht of 1713 commemorated the close of one commercial era and the opening of another. In particular, the treaties between France and England of March 31 and April 11,⁶ and that between France and the United Provinces of the same date⁷

³ Journals of the Continental Congress, Ford edition, V, 433.

⁴ *Ibid.*, 576. ⁵ *Ibid.*, 813. ⁶ Dumont, Vol. 8, Part I, p. 345. ⁷ *Ibid.*, p. 377.

contained many of the provisions of Adams's draft. Several articles of the draft are of especial significance. Article 19 was as follows:

It shall be lawfull for the Ships of War of either Party and Privateers, freely to carry whither so ever they please, the Ships and Goods, taken from their Enemies, without being obliged to pay any Duty to the Officers of the Admiralty or any other Judges; nor shall such Prizes be arrested, or seized, when they come to, and enter the Ports of either Party; nor shall the Searchers, or other Officers of those Places search the same, or make Examination concerning the Lawfulness of such Prizes, but they may hoist sail, at any Time and depart and carry their Prizes to the Place expressed in their Commissions, which the Commanders of such Ships of War shall be obliged to shew: on the Contrary, no Shelter, or Refuge shall be given in their Ports to such as shall have made Prize of the Subjects, People, or Property, of either of the Parties; but if such should come in, being forced by Stress of Weather, or the Danger of the Sea, all proper Means shall be vigorously used, that they go out, and retire from thence as soon as possible.

This sets forth in English the text of the twenty-sixth article of the Franco-British treaty of 1713. Article 27 of the draft includes a restricted list of contraband identical with that of Article 19 of the Franco-British treaty; and the list of merchandise never to be reckoned among contraband or prohibited goods which immediately follows in the draft is taken verbatim from Article 20 of the same treaty. Article 23 of the draft is as follows:

For the better promoting of Commerce on both Sides, it is agreed, that if a War should break out between the Said two Nations, Six Months, after the Proclamation of War, shall be allowed to the Merchants, in the Cities and Towns where they live, for selling and transporting their Goods and Merchandizes; and if any Thing be taken from them, or any Injury be done them within that Term by either Party, or the People or Subjects of either, full Satisfaction shall be made for the Same.

This is derived without substantial change from Article 2 of the same treaty. Article 26 of the draft provides that free ships make free goods; while, on the other hand, that enemy ships make enemy goods was recognized by Article 16 of the draft. Both provisions were taken from the Franco-British treaty.

Enough has been said to warrant the conclusion that the doctrines of free ships, free goods; enemy ships, enemy goods; limited contra-

band list, and asylum for prizes appearing in the draft were derived from the corresponding provisions of the treaties of Utrecht; and these provisions, in addition to the more usual ones of the most favored nation clauses and the right to navigation and residence, the abolition of the *droit d'aubaine*, give us the main features of nearly all of the commercial treaties entered into between the United States and European countries during the period of the Confederation. The draft of July, 1776, was followed to a surprising degree in the French treaty of 1778. The provision with reference to asylum for prizes which appears in the French treaty was significantly placed, not in the treaty of alliance, but as Article 17 of the commercial treaty of 1778. The treaty with the Netherlands follows the French treaty or the draft as a common source with a few important exceptions. The provisions as to free ships, free goods, enemy ships, enemy goods, and asylum for prizes were repeated. The contraband article did not particularize as to the list of goods which could not be made contraband of war. The period of six months given to the nationals of the contracting parties for the purpose of quitting the country in case of war was increased from six to nine months, and in this respect followed the provisions of Article 41 of the Franco-Dutch treaty of Utrecht.⁸

The Swedish treaty of 1783 again follows very closely the provisions of the commercial treaties, even to the provision for asylum for prizes; and this treaty, negotiated by Franklin, was used as the basis of the negotiations with Prussia which were begun by John Adams.

II

THE NEGOTIATION OF THE TREATY OF 1785

The negotiation of a commercial treaty with the Netherlands, begun by John Adams, April 23, 1782, dragged along until October 8 of that year, when the treaty was signed. At Paris, meanwhile, overtures for a commercial treaty were made to Franklin by the Swedish ambassador. Writing to Livingston August 12, 1782, Franklin said, "I understand from the Swedish ambassador that their Treaty with us will go on as soon as ours with Holland is finished; our Treaty with

⁸ Dumont, VIII, 1, 381.

France, with such improvements as that with Holland may suggest, being included as the basis." ⁹ Before the Netherlands treaty was signed, Franklin received his commission to negotiate a treaty with Sweden "having for its basis the most perfect equality, and for its object the mutual advantage of the parties." ¹⁰ The following April the treaty was signed by Franklin at Paris. The original instructions from the Continental Congress had not been materially changed since 1776, and the terms of Franklin's treaty departed little from those which Adams had agreed to at the Hague. "It differs very little from the plan sent me, in nothing materially." As this treaty was taken by Adams and Thulemeier, the Prussian minister at The Hague, as the basis for the Prussian treaty, the draft of Adams of 1776, the French commercial treaty of 1778, the Netherlands treaty of 1782, and that with Sweden of 1783 became linked together into one consistent body of principles.

To the extent to which these earlier treaties negotiated by the United States contained provisions which were carried into that with Prussia, we have but a continuation of a foreign commercial policy which antedates the Declaration of Independence. This policy, as expressed in Adams's draft of 1776 and in the French, Dutch, and Swedish treaties, was one based upon several considerations. It represented in the main the position of the continental European Powers, which had been opposed at times or continuously to the sea-power of Great Britain. Of these continental Powers France was the most conspicuous and powerful. Adams's draft incorporated the principles and practices of the opposition to British sea-power as they had been developed during the latter half of the seventeenth and all of the eighteenth century. These were advocated by most of the continental text-writers of the eighteenth century, who, influenced by the spirit of "enlightenment," strove for the recognition, not only of the so-called fundamental rights of states, but also of the newer rights of neutrals, all of them bulwarks of protection against brute force, whether exercised on land or sea. Of these, Vattel was the text-writer most in fashion, but it was Hübner, in his work on the capture of neutral vessels,

⁹ Sparks, *Dip. Corr. Rev.*, II, 389, quoted by Davis, Notes, 1398.

¹⁰ Sept. 28, 1782, *Dip. Corr. (Confed.)*, I, 34.

who gave fullest recognition to neutral claims.¹¹ Still later Galiani and Lampredi argued for neutral rights in doctrines which had found expression in the legislation of several Italian states some years before the famous neutrality proclamation of 1793.¹²

Adams's draft and the treaties based on it were, therefore, in harmony with continental theory and practice and opposed to the English prize-rules. In them all were the doctrines of (a) free ships, free goods; (b) its complement, enemy ships, enemy goods (especially valuable as against England); (c) the contraband list limited to war munitions and supplies; (d) the regulation of visitation and search by providing for approach; (e) the regulation of privateering by the requirement of bonds against unlawful seizures and unnecessary injury; (f) asylum for prizes; (g) nationals of one country to be considered as pirates who accepted letters of marque from the enemies of the other country. These were the leading provisions which protected the rights of neutrals. In time of peace nationals of the contracting parties were to be accorded either equality of treatment in their respective territories or treatment upon a most favored nation basis. In time of war a definite period was to be given for enemy aliens to arrange their affairs and depart freely. Summing up all these, we may say that the policy of the United States from the first was for freedom of intercourse in time of peace, as opposed to the older principles of mercantilism, for the rights of neutrals as against the claims of force, and for the preservation of personal and property rights on land, even in time of war. Until the Prussian treaty was signed, no commercial treaty entered into by the United States contained a single novelty. All of their provisions represented enlightened practice, most of them in harmony with the general maritime principles adopted by France, and in opposition to those of England. Adams's treaty with the Netherlands and Franklin's with Sweden continued in line with this general policy.

During the summer of 1783, following the signature of the Swedish treaty, Adams and Franklin received proposals for commercial trea-

¹¹ Hübner, *De la Saisie des Bâtimens Neutres*, 1759. The edition usually cited is that of London, 1778.

¹² De Martens, *Recueil*, III, 24-87. Tuscany, Aug. 1, 1778, followed by the Two Sicilies, Sept. 19, 1778, the Pope, March 4, 1779, and Genoa, July 1, 1779.

ties from Denmark, Portugal, Austria, Prussia, Tuscany, and Spain. Congress resolved that "the Minister of the United States be instructed to encourage overtures for treaties of amity and commerce from the respectable and commercial Powers of Europe, upon terms of the most perfect reciprocity, and subject to the revisal of Congress prior to their ratification."¹³ Instructions in line with this resolution were adopted October 29, 1783. Special provisions were included for the negotiations with the Empire (Austria), Denmark, and Great Britain; but as to the other commercial Powers, no new instructions were formulated beyond the caution that the new treaties should not conflict with the previous obligations of the United States, that their terms should be for not more than fifteen years, and that they should be binding only when ratified by the Congress.¹⁴

The overtures to Franklin on the part of the Prussian minister at Paris did not directly propose a treaty. Writing to Livingston, July 22, 1782, Franklin said, "[He] has given me a Pacquet of lists of the several sorts of merchandise they can furnish us with, which he requests me to send to America for the information of our merchants."¹⁵ No further steps were taken by Franklin, and the negotiation was opened at The Hague in February, 1784, between John Adams and Baron de Thulemeier, long resident at the Dutch capital as Frederick's diplomatic representative. Thulemeier informed Adams that "an arrangement might be made between his Crown and the United States which would be beneficial to both." Adams pleaded want of instructions and told Thulemeier that he could do nothing except in concurrence with Franklin and Jay, both then at Paris. Adams's colleagues concurred heartily in the plan of negotiating with Thulemeier, and suggested that in order to save time a draft treaty should be drawn and transmitted to Congress, which could then issue a commission to negotiate and sign, together with special instructions for the modification of the draft.¹⁶

Adams's negotiation with Thulemeier proceeded according to the plan agreed to by Franklin and Jay. Adams submitted to the Prussian representative a copy of the Swedish treaty, which was forwarded to

¹³ Dip. Corr. (Confed.), I, 40.

¹⁴ *Ibid.*, 42-44.

¹⁵ Franklin, Works (Smith's ed.), IX, 67.

¹⁶ Adams to President of Congress, March 9, 1789, Dip. Corr. (Confed.), I, 435-7.

Frederick. Schulenberg, Frederick's minister, was directed to draft from it a *projet* to be submitted to Adams. The Prussian *projet*, probably in the main the work of Schulenberg, was delivered to Adams early in April, 1784.¹⁷ In general the terms of the *projet* were identical with those of the Swedish treaty. Special provision was made (Article 3) for the importation into the United States of Silesian linens and articles of Prussian manufacture, and for similar entry of American staples into Prussia upon a most favored nation basis. The contraband list was identical, save that saltpetre and cuirasses were omitted. Linens were specified as non-contraband, while gold was struck from the list of free goods. The reservation as to convoy appearing in Article 12 of the Swedish treaty was omitted. By Article 6 of the *projet* consuls were to be on the most favored nation basis, while the Swedish treaty provided for a special regulation on the subject. More significant was the omission of provisions based on Articles 22 and 23 of the Swedish treaty. The first of these provided for a term of nine months after the declaration of war between the parties in order that the merchants and other subjects of the contracting parties respectively might settle their affairs and withdraw from the other country. Similar provisions had been inserted in the treaties with the Netherlands and France (six months), derived, as has been indicated, from the draft of 1776. Article 23 had forbidden the nationals of Sweden and the United States respectively to accept letters of marque from each other's enemies under penalty of punishment as pirates. This provision had been copied from the earlier treaties of the United States and from the draft of 1776.

Adams's objections to the Prussian *projet* were not serious. He reported to Congress, June 7, 1784, that "the treaty is ready for signature, unless Congress have other alterations to propose."¹⁸ His principal amendment was that the provision for asylum for prizes should protect the rights reserved to France: "No shelter nor refuge shall be given in their ports or harbors to such as shall have made prizes of the subjects of his Majesty, or of the said United States; and if they are forced to enter by distress of weather or the danger of the sea, they

¹⁷ Thulemeier to Adams, N. D. Dip. Corr., I, 442.

¹⁸ Adams to President of Congress, June 7, 1784. Dip. Corr. (Confed.), I, 458.

shall be obliged to leave as soon as possible." Adams suggested this addition: that "in case of war between Prussia and France, it would not be admissible for the United States of America to derogate from antecedent treaties concluded with the Most Christian King in favor of a more recent obligation contracted with his Prussian Majesty."¹⁹ Thulemeier then proposed that the provision for asylum for prizes be omitted altogether, substituting therefor the following provision, which was in every respect in harmony with the modern doctrine of neutrality: "The armed vessels of one of the contracting parties shall not conduct prizes that shall have been taken from their enemies into the ports of the other unless they are forced to enter therein by stress of weather or danger of the sea. In this last case they shall not be stopped nor seized, but shall be obliged to go away again as soon as possible."²⁰ This change was made at the suggestion of Frederick. The right to bring prizes into American ports was of no value to him. There was small likelihood of any Prussian vessel of war ever taking prizes into an American port. On the other hand, there was danger of falling into the difficulties which the Netherlands and Denmark had encountered through the operations of John Paul Jones. American privateers were likely in case of war to operate in European waters and to need European ports as places of refuge. For Prussia to accept such a provision would be to assume a burden without receiving a corresponding benefit. Adams insisted that such a provision was a necessity to the United States.

At this point Adams's negotiation with Thulemeier closed. Congress, on May 12, 1784, issued a commission to Adams, Franklin, and Jefferson to negotiate a treaty with Prussia. Adams waited at The Hague until about the first of September, when Jefferson arrived at Paris. The three commissioners, writing to Thulemeier from Passy, September 9, 1784, informed him "that we are here ready to enter on the negotiation, and to reconsider and complete the plan of a treaty which has already been transmitted by your Excellency to your Court, whenever a full power from his Prussian Majesty shall appear for that

¹⁹ *Ibid.*, 462. No such conflict was provided for in the Swedish treaty, nor in Article 5 of the additional convention with the Netherlands.

²⁰ *Ibid.*, 462-3. John Adams, Works, IX, 203.

purpose.”²¹ These commissions were accompanied by new instructions adopted by Congress May 7, 1784. Several provisions of these new instructions required a material recasting of the draft which had in most respects been agreed upon by Adams and Thulemeier. The first was an elaboration of Article 22 of the Swedish treaty, which followed the terms of Article 18 of the Netherlands treaty, Article 20 of the French, and 23 of the draft of 1776, and had been omitted from the Prussian *projet*.²² The article of the treaty had protected merchants and other enemy nationals for the space of nine months after the outbreak of war and provided them with passports for leaving the country. The Continental Congress now included special provision for all fishermen, all cultivators of the earth, and all artisans or manufacturers, unarmed, and inhabiting unfortified towns, villages, or places, who labor for the common subsistence and benefit of mankind, and peaceably following their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy, in whose power, by the events of war, they may happen to fall; but if any thing is necessary to be taken from them, for the use of such armed force, the same shall be paid for at a reasonable price; and all merchants and traders, exchanging the products of different places, and thereby rendering the necessities, conveniences, and comforts of human life more easy to obtain, and more general, shall be allowed to pass free and unmolested; and neither of the contracting Powers shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships, or interrupt such commerce.²³

The next provision of the new instructions related to contraband. The Swedish treaty, in Article 9, followed the earlier treaties and the draft of 1776, including the restricted list appearing in the Franco-

²¹ Dip. Corr. (Confed.), I, 503. Similar commissions were issued by the Continental Congress to Adams, Franklin, and Jefferson to negotiate commercial treaties with Russia, Germany (Austria), Prussia, Denmark, Saxony, Hamburg, England, Spain, Portugal, Naples, Sardinia, the Pope, Venice, Genoa, Tuscany, the Porte, Morocco, Algiers, Tripoli, and Tunis; *ibid.*, 80, 501. The Prussian treaty was the only one negotiated under these commissions.

²² The same principle appears in Article 2 of the commercial treaty between Great Britain and France, 1713. Cf. also Article 14 of the treaty of peace between the same Powers, 1713; Article 17, Great Britain and Portugal, 1642; Article 36, Great Britain and Spain, 1667; Article 12, Great Britain and Russia, 1766. See Camillus (Alexander Hamilton), Defense of the [Jay] Treaty, Letter 22.

²³ Dip. Corr. (Confed.), I, 81-82.

British treaty of 1713.²⁴ This proposition, numbered four in the resolutions of the Continental Congress, and that numbered five in the same resolution, were adopted verbatim from those made by the American peace commissioners at Paris, June 1, 1783, for insertion into the definitive treaty of peace with Great Britain.²⁵ The proposition numbered five in the instructions was that contraband, described as "arms, ammunition, and military stores of all kinds," should not be confiscated, but might be requisitioned. Both propositions were unquestionably originally the work of Franklin, and contained ideas which in part had been suggested by him during the negotiations of the preliminary articles of peace. Writing Oswald, January 14, 1783, Franklin said,

I enclose two papers that were read at different times by me to the Commissioners; they may serve to show, if you should have occasion, what was urged on the part of America on certain points: it may help to refresh your memory. I send you also another paper, which I once read to you separately. It contains a proposition for improving the Law of Nations by prohibiting the plundering of unarmed and usefully employed people. I rather wish than expect that it will be adopted. . . . It has not yet been considered by my colleagues, but if you should think or find that it might be acceptable on your side, I would try to get it inserted in the general treaty. I think it will do honour to the nations that establish it.²⁶

The proposition referred to is in the form of a draft article for a treaty. It is identical with the fourth item of the new instructions of May 27, 1784.

Oswald was not returned for the negotiation of the definitive treaty, and David Hartley, an old friend of Franklin and "a strong lover of peace," took his place. Adams and Jay agreed to the articles which Franklin had outlined to Oswald, and Hartley sent them to London for the approval of the British Ministry. A copy was delivered to Vergennes at the same time. He acknowledged its receipt with the statement that he would need time to examine the articles before giving his judgment as to their wisdom in so far as they related "to our

²⁴ This contraband list antedates the treaties of Utrecht and is found without material change in the treaty between England and Sweden of 1656, Article 2, and in several other treaties between that time and 1713, as well as later. See Atherley-Jones, *Commerce in War*, 15, *seq.*, for comparative lists.

²⁵ Wharton *Dip. Corr. Rev.*, VI, 471.

²⁶ Franklin, *Works*, IX, 3, 4.

reciprocal interests.”²⁷ Franklin urged Hartley to procure for his nation “the glory of being, though the greatest naval power, the first who voluntarily relinquished the advantage that power seems to give you of plundering others, and thereby impeding the mutual communications among men of the gifts of God, and rendering miserable multitudes of merchants and their families, artisans, and cultivators of the earth, the most peaceable and innocent part of our human species.”²⁸

After the formal presentation of the articles to Hartley, the negotiations were continued until August, when the British Ministry decided to agree to no alterations of the provisional articles, and to base the definitive treaty upon them only. All commercial matters were to be left to be arranged by a separate treaty to be negotiated later. Thus rejected by Great Britain, Franklin’s articles were adopted in the next year by the Continental Congress and returned as familiar provisions to Franklin and Adams, then about to negotiate with Prussia. The idea of “delivering out” articles classed as contraband was added by Congress to Franklin’s proposition of 1783 in these words:

But if the other contracting party will not consent to discontinue the confiscation of contraband goods, then that it be stipulated, that if the master of the vessel will deliver out the goods charged to be contraband, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, but shall be allowed to proceed on her voyage.

This provision is the same, *mutatis mutandis*, as that in Article 13 of the treaty with Sweden, Article 25 with the Netherlands, Article 25 with France, and Article 28 of the draft of 1776.²⁹

Another important section of the new instructions adopted some

²⁷ Franklin to Vergennes, May 5, 1783; Vergennes to Franklin, May 5, 1783. *Ibid.*, 38-39.

²⁸ Franklin to Hartley, May 8, 1783. *Ibid.*, 40.

²⁹ Mr. Atherley-Jones (Commerce in War, 388) says “The first conventional application of this practice [of delivering out contraband] appeared in the treaty of commerce between Russia and Denmark of October 8/19, 1782.” It had appeared, as indicated, in two treaties negotiated before that time by the United States, and was no invention by the authors of the draft treaty of 1776. The same provision will be found in the Franco-British commercial treaty of 1713, Article 26, which was renewed February 10, 1763, and again broken in 1778 by the outbreak of war. It was a popular provision in commercial treaties between 1780 and 1856.

of the principles of Armed Neutrality: one, that free ships make free goods, with the omission of enemy ships, enemy goods; the other, that blockades, to be lawful, must be maintained by a sufficient naval force so as to expose blockade runners to "imminent danger."³⁰ The first was an important departure from the earlier American policy which had adopted the stricter French practice of holding "enemy ships, enemy goods," which bore more severely upon neutrals than did the old rule of the *Consolato*, followed by England and early contended for by Franklin as the unwritten rule of international law. The doctrine that blockades should be effectively maintained was one of the important maxims of the Armed Neutrality.

A counter *projet* prepared by the American commissioners in accordance with their new instructions was sent to Thulemeier in December, 1784, who sent it to the king with an enthusiastic approval of the new provisions. Frederick, in turn, asked his ministers for their opinion of them. Objecting to certain minor provisions which appeared for the first time in the counter *projet*, they expressed disapproval of the article providing for neutral asylum for prizes. Generally, however, they took the position that as war aimed, not at the ruin of individuals, but at a lasting peace, privateering should be regulated or abolished, and that the ordinary commerce of neutrals should not be interrupted by war. Only such neutral goods, therefore, ought to be interfered with as could be used directly in war or were sought to be taken to a blockaded port. The new provisions went further than this, yet they felt that the king might well agree to them as in harmony with the spirit of the age and for his greater glory. Comparatively few changes were made in the counter *projet*, and Frederick finally agreed to include the article on asylum for prizes.³¹

By the last of May, 1785, the treaty was in definitive form. In June it was translated into French and sent to Frederick, who authorized its signature. By the time the treaty was ready to be signed the

³⁰ Cf. Danish declaration, July 8, 1780; De Martens, *Causes Célèbres*, 2d ed., III, 278. It is an interesting coincidence that this exposition of the principles of the Armed Neutrality in 1780, the denial of the right of a neutral to allow the exportation of munitions in 1870, and Germany's contentions as to the neutral duties of the United States from 1914 to 1917 were made by three Counts von Bernstorff.

³¹ Kapp, *op. cit.*, *passim*.

American commissioners had separated. Franklin signed at Passy on the 9th of July, Jefferson at Paris on the 28th of July, and Adams at London on the 5th of August, and, finally, Thulemeier signed at The Hague on the 10th of September, 1785. The original of the treaty was in French and in English. When Franklin signed, the French text had not reached Paris, and he signed only the English text. Jefferson and Adams signed both originals, as did Thulemeier. The English original was then sent to the United States for ratification by the Continental Congress. This took place May 17, 1786, and ratifications were exchanged at The Hague late in the following October.

III

THE TREATY OF 1799

The duration of the treaty of 1785 covered a decade, the events of the last portion of which immediately involved the United States in the contests of the world brought on by the aggressive wars of the French Republic. As the contest continued, the United States was faced for the first time with the difficulties of preserving neutrality in a contest between sea-power, on the one hand, and a continental Power seeking to overthrow the existing sea-power, upon the other. The situation resulted in a remolding of the foreign policy of the United States by the Federalists. The Jay Treaty may be taken as a measure of their success or failure. The question of the renewal of the treaty must be regarded in the light of the Jay Treaty and the effect which its provisions had upon the continental European Powers.

Jay was instructed, it will be remembered, to seek the adoption by England of the principles of the Armed Neutrality and generally for the provisions of the Prussian treaty, even "if attainable by abolishing contraband altogether."²² This squarely challenged those principles of maritime practice for which England had contended. Any departure, however slight (and the departure was very slight), from British practice which Jay managed to incorporate into the treaty of 1794 was to that extent a victory for the traditional American (and hence continental) policy, broken in upon, it is true, by the series of

²² Instructions to Jay, Am. State Papers, F. R., I, 473.

treaties which from time to time England had negotiated down to that of 1786 with France.³³ The last short-lived treaty renewed the restricted contraband list of 1713, included the same list of free goods, provided for delivery out of contraband, as well as for free ships, free goods, enemy ships, enemy goods, and asylum for prizes.³⁴ The outbreak of the war between England and France abrogated this treaty and gave rise to a series of reprisals affecting neutral commerce which culminated in the final entry of the United States into war against Great Britain in 1812. With this treaty set aside, Great Britain fell back upon the strict rules of the so-called unwritten law of nations for which she had contended at the time of the Silesian loan controversy. What England had been willing to recognize with France in 1786 was not likely under the change of circumstances to be adopted by her in the negotiation with Jay in 1794. The acceptance by Washington and Congress of Jay's treaty represents their abandonment of the earlier American policy. This was thought to be necessary because of the peculiar character of the conflict between British sea-power and a continental land-power seeking to dominate the sea. "Free ships make free goods" was surrendered. The contraband list, while restricted, included naval stores. Instead of a definite free list, conditional contraband was provided for, the articles of which were not to be confiscated, but to be requisitioned and paid for. Foreign enemy privateers were not to be allowed to arm in either British or American ports or to sell their prizes therein. The provision for asylum for prizes followed in general the provisions of the Prussian treaty, but added:

No shelter or refuge shall be given in their ports to such as shall have made a prize upon the subjects or citizens of either of the parties; but if forced by stress of weather or the dangers of the sea to enter therein, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this treaty contained shall, however, be construed to operate contrary to former and existing treaties with other sovereigns or states. But the two parties agree that while they continue in amity neither of them will in future make any treaty that shall be inconsistent with this or the preceding article [as to foreign privateers].

³³ Cf. *Neutral Rights*, by J. F. W. Schlegel, American ed., 1801, for an examination of these.

³⁴ De Martens, *Recueil*, IV, 155.

Most important perhaps of all was Article 17, which directly recognized the old rule of the *Consolato*.

Hartley, in 1783, had said that by nature England and the United States must be closely associated either as enemies or as friends. The Jay Treaty recognized this and chose the latter alternative. The effect was seen when the Prussian treaty was about to expire. Steps were taken by Adams to renew it. Passing by the objections raised as to the appointment of John Quincy Adams as minister to Prussia in 1796, objections partly personal and partly based upon opposition to the creation of such a mission, and partly, too, upon the change in the policy of the United States in shifting from the principles of the treaty of 1785 to those of 1794, the appointment was ratified by the Senate.³⁵

Pickering sent instructions for the negotiation of the treaty to John Quincy Adams, who was then at The Hague, expecting to be sent to Portugal, to which he had previously been appointed as minister. Pickering instructed Adams to omit the provision of the earlier treaty (copied from Article 17 of the Swedish treaty) exempting the vessels of either party from embargo so as to render them liable to a general embargo, a provision which had caused embarrassment to the United States in 1794. The twenty-third article, which forbade the commissioning of privateers to prey upon the commerce of the other in case of war, was also to be omitted. "Considering," wrote Pickering, "the abuses too often committed by privateers and the spirit in which privateering is commenced and prosecuted, it has sometimes appeared desirable to abolish the practice altogether. But the policy of this principle, as it respects the United States, may well be doubted. We are weak at present in public vessels of war. . . . Our chief means, therefore, of annoying and distressing a maritime enemy must be our privateers." The principle that free ships make free goods was to be abandoned. This doctrine, as expressed in all the previous treaties of the United States, except the Jay Treaty, was "of little or no avail, because the principle is not universally admitted among the maritime

³⁵ John Quincy Adams, *Memoirs*, I, 195-7. Senate Executive Journal, I, 158-9. The Senate voted, eighteen to eleven, against the motion that "there is not, in the opinion of the Senate, any present occasion that a minister be sent to Prussia." See Wheaton's *International Law*, secs. 457-470, omitted in Phillipson's recent edition.

nations. It has not been regarded in respect to the United States when it would operate to their benefit; and may be insisted upon only when it will prove injurious to their interests." Later Pickering added, "The abandonment of that principle was suggested by the measures of the belligerent Powers during the present war, in which we have found that neither its obligations by the pretended modern law of nations, nor the solemn stipulations of treaties, secured its observation; on the contrary, it has been made the sport of events."⁸ Further, Pickering proposed to omit the provision abolishing the right to confiscate contraband and to substitute therefor the stipulations of the Jay Treaty, including naval stores as contraband.

The instructions to Jay in 1794 followed the lines of the Prussian treaty of 1785; those to Adams in 1797 followed the provisions of the Jay Treaty; in the three years the United States as a neutral had completely reversed the commercial policy adopted in 1776 when a belligerent. The administration judged it impossible for the United States as a neutral in a great maritime war successfully to contend for the old policy. Some leeway was given Adams, depending upon an

⁸ Pickering to John Quincy Adams, Am. State Papers, F. R., II, 250. Writings of John Quincy Adams, II, 188-191. We have here the adoption of the American position that the rule of the *Consolato* was the true rule of international law; that "free ships make free goods" was valid only when stipulated in treaties. The phrase "pretended modern law of nations" refers to the continental position based on the law of nature. The English doctrine was adopted by Marshall for the reason that "the United States, having at one time formed a component part of the British Empire, their prize law was our prize law. When we separated it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it." *Bentzon v. Boyle*, Scott's Cases, 600. Though in many respects influenced by the law of nature (as in *Fletcher v. Peck*) Marshall did not adopt the theory that "free ships make free goods" was based on the law of nature, as held by the continental writers. It is suggested that Marshall's doctrine was influenced by the Federalist position from 1794 to 1799. Sir William Scott, afterwards Lord Stowell, sent to Jay, Sept. 10, 1794, a memorandum on prize court procedure, in which was incorporated a portion of the famous report of the law officers of the Crown made in 1753 at the time of the Silesian loan case. This portion set forth the doctrine of the *Consolato* as against free ships, free goods. Am. S. Papers, F. R., I, 494; Montesquieu characterized the report as *réponse sans réplique*. Vattel called it *un excellent morceau du droit de gens*. Law and Custom of the Sea (Naval Records Society, ed. Marsden), II, 348 n.

early peace or the continuation of the war. "If the negotiations for peace should be broken up, and the war continue, and more especially if, as you have conjectured, the United States should be forced to become a party in it, then it would be extremely impolitic to confine the enterprises and exertions of our armed vessels within narrower limits than the law of nations prescribes."

Adams received these instructions by the last of October, 1797. While he was in no sense pro-French, neither was he converted to the pro-British position of Pickering. "It is to my mind very questionable whether it would be expedient to propose the alterations suggested in your letters, except that relative to embargo," he wrote Pickering. "The principle of making free ships protect enemy's property has always been cherished by the maritime Powers who have not had large navies, though stipulations to that effect have in all wars been more or less violated. In the present war, indeed, they have been less respected than usual, because Great Britain has had more uncontrolled command of the sea, and because France has disclaimed most of the received and established ideas upon the laws of nations and considered herself as liberated from all the obligations towards other states which interfere with her present objects or interests of the moment." Nevertheless, as every abandonment of neutral rights would strengthen British power, he insisted that it was the policy of every naval state to maintain "liberal maxims in maritime affairs against the domineering policy of Great Britain."³⁷

After Adams arrived at Berlin, Frederick II died. Many vexatious delays interfered with the opening of negotiations, and not until May 19, 1798, did Adams receive credentials to be presented to Frederick's successor. With them Pickering sent new instructions. They were drafted upon the theory that the United States would soon be in the war against France. "With this prospect before us, no considerations occur which should induce" the admission of free ships, free goods. The recent French decrees which stated that the character of a vessel should be determined by the origin of its cargo, irrespective of ownership, was, it had been claimed, directed exclusively against the American merchant marine.

³⁷ John Quincy Adams to Pickering, Oct. 31, 1797; Writings, II, 218.

In this case a reversal of that stipulation is positively to be refused. The Swedish and Prussian commerce will then be only on the footing of the commerce of Denmark, with whom we have no treaty; and if we must be involved in the war, it will be desirable that the commerce of those three Powers, in relation to the United States, should rest on one and the same principle. But if this iniquitous French law exists (and we have no reason to doubt it), will all the northern Powers submit to it? We hope not. We hope that the inordinate ambition of France, and avowed design to subjugate all Europe (of which she already calls herself "the great nation" and "the conqueror") will excite the resistance of all the Powers whom her arms have not reached and arouse anew those whom the course of events have induced to submit. At present Britain appears to be the only bulwark against the universal domination of France, by sea as well as by land.²⁴

Prussia, however, had made a treaty of peace with France, and Haugwitz, with whom Adams negotiated, was of notoriously Francophile sympathies. Discussing the French decrees against neutral commerce, Haugwitz told Adams that three alternatives were presented: one, tamely to submit and take their law from France (which he hoped they would not do); two, to throw themselves into the arms of England; or, three, to unite neutral nations for the defense of their rights, as another Armed Neutrality against France and England. Adams agreed that the third was the plan which the United States favored, though it was certainly not in line with his instructions, which adopted the second. Upon the receipt of this report of Adams's interview with Haugwitz, Pickering answered by a letter, which is remarkable not only for the light which it throws upon the policy of the Adams administration in its attitude toward France and England, but even more so for its relation to the situation in which the United States was put from August, 1914, to April 6, 1917. Let "Germany" be substituted for "France" and "submarine warfare" for "French decrees" (which, however tyrannical, at least had regard for human life), and the letter of Pickering becomes an exposition of the position of the United States as a neutral in the great war. The impotence of the northern Powers today results from the same conditions as in 1798, except that they are now more immediately at Germany's mercy than they were in 1798 at the mercy of France.

²⁴ Pickering to John Quincy Adams, March 17, 1798, *Am. State Papers*, F. R., II, 251.

Your conversation with the Prussian minister, as detailed in your letter of the 19th of February, is very interesting. The third of the alternatives mentioned by him, to maintain the dignity of the rights of neutral commerce, would, as you assured him, be most agreeable to the United States in reference to France. Both the others we should certainly reject. But at present how is the small maritime force of the northern neutral powers of Europe, with or without the inconsiderable armed ships of the United States, to control the British marine? The arming of Sweden and Denmark for this purpose in 1794 we know was perfectly futile. And in the existing state of things it would be highly impolitic to embarrass Great Britain by any maritime combination. For however much reason the neutral nations have to complain of her measures, the little finger of France in maritime depredations is thicker than the loins of Britain, and the safety of the portion of the civilized world not yet subjugated by France greatly depends on the barrier opposed to her boundless ambition and rapacity by the navy of England. If this navy were crushed or subjected to the power of France she would instantly become the tyrant of the seas, as she is already of the European continent. At present her rapacity is confined by the inferiority of her naval force which therefore exerts itself chiefly in acts of piracy on neutral commerce. But were the British navy subdued, France would insultingly prescribe law to the whole maritime world. If British cruisers commit aggressions, there is a well-founded expectation of redress, at least, in the supreme courts; but those of France, from the lowest to the highest, are generally corrupt and prompt to establish violence in the forms of law, and where the judges felt compunction (a most rare occurrence) the terror of the government enforces the execution of its iniquitous decrees. I refer to their practice in France. In their consular courts in Spain, and their West Indian tribunals, it is, if possible, still worse. Yet from the decisions of the consuls in Spain, although a number of appeals have been made to the courts in France, I do not recollect a single instance that has proved successful. In the West Indies nobody thinks of entering an appeal.

If there were to be a combination of the neutral powers to protect their commerce, it is against France that their force should be directed. But this is scarcely to be hoped for in respect to any of the powers to whose territories her armies can march, until her monstrous tyranny becoming still more insupportable at home as well as abroad, all Europe shall rise to overturn the execrable government that wields her immense force.³⁹

Meanwhile Adams continued his efforts toward a revival of the system of the Armed Neutrality, though doubting that the United

³⁹ Writings of John Quincy Adams, II, 259.

States would be permitted to remain a neutral. He urged the arming of merchant vessels to oppose the French decrees at the same time that his father, as President, was urging the same policy, and seemingly without any suspicion that the arming of such vessels would be a departure from strict neutrality, as, indeed, it was not.⁴⁰ Still unwilling to surrender the principle of free ships, free goods, concerning which he agreed with Hübner and Lampredi that it was sustained by the law of nature, he suggested that a compromise might be made which would have the merit of consistency and mutuality. France, he said, had uniformly professed her attachment to the principle, and only departed from it because of England's practice. "It appears to me, therefore, that the stipulations ought properly to be made contingent," and that the parties to a commercial treaty "should agree that in all cases, when one of the parties should be at war and the other neutral, the bottom should cover the property, *provided the enemy of the warring power* admitted the same principle and practiced upon it in their courts of admiralty; but if not, that the rigorous rule of the ordinary law of nations [*i.e.*, the rule of the *Consolato*] should be observed."⁴¹ Pickering agreed to Adams's suggestion, provided the stipulation should apply to "all neutral nations, as well as the contracting party remaining neutral."⁴²

In July, Adams formally presented his plans for a renewal and alteration of the treaty of 1785. These were strictly in line with Pickering's instructions: the substitution of the rule of the *Consolato*, the recognition of the doctrine of contraband, including naval stores and material for ship-building, the abolition of special embargoes, and excluding the article against privateering. The provision as to asylum for prizes, he insisted, required alteration as in conflict with the present engagements of the United States with France and England.⁴³

⁴⁰ John Quincy Adams to Pickering, March 8, 1798. Message of John Adams, March 14, 1798. John Quincy Adams, Writings, II, 267. The French had threatened to consider every armed ship as enemy and the sailors thereof as pirates.

⁴¹ Adams to Pickering, May 12, 1798; Writings, II, 287. Adams introduced this provision into the Florida treaty, Article 12.

⁴² Pickering to Adams, Sept. 24, 1798. *Ibid.*, II, 287.

⁴³ John Quincy Adams to the Ministers of State, etc., July 11, 1798. Am. State Papers, F. R., II, 252.

The Prussian commissioners declined to abandon free ships, free goods as a principle universally held by the northern nations, but, realizing the impossibility of effecting a recognition of it, in the circumstances, proposed that they agree to work for the adoption, after the conclusion of the war, by the great maritime Powers of Europe, of an arrangement "as would serve to establish upon fixed and permanent rules the liberty and security of neutral navigation in future wars." While willing to adopt the doctrine of contraband, they insisted upon the list as inserted in the treaty between Russia and Prussia of 1781, the traditional "restricted lists," rather than the one contained in the Jay Treaty. Ship-timber was not to be included as contraband because it was one of Prussia's principal productions. As to the prohibition of privateering under Article 23 of the old treaty, this was dictated, they said, "doubtless by the purest motives of benevolence and humanity, and it is not to be expunged without regret; but as this pleasant theory can with difficulty be put into practice, it only remains to renounce it, especially as the policy of the United States may be effected by it." ⁴⁴

In transmitting the Prussian answer, Adams said that unless he could admit free ships, free goods, and exclude ship-timber from the list of contraband, he had "no sort of expectation that the treaty would be renewed." ⁴⁵ He finally agreed to eliminate ship-timber from the contraband list, and to say nothing in the treaty relative to free ships, free goods, thus abandoning the conditional declaration which he had suggested to Pickering. Adams argued, though doubtless with little enthusiasm, that free ships, free goods was not the rule of international law. The contraband list required more precise determination. One statement is significant: "It would . . . be proper to omit the term 'provisions,' which appears synonymous with that of 'munitions of war' and which is susceptible of being interpreted in a broader sense than intended by the high contracting parties." ⁴⁶

This was agreed to by the Prussian negotiators. "It is to be pre-

⁴⁴ Finckenstein, Alvensleben, and Haugwitz to John Quincy Adams, Sept. 25, 1798. Am. State Papers, F. R., II, 254.

⁴⁵ Adams to Pickering, October, 1798, *Ibid.*, 253.

⁴⁶ Adams to the Prussian Ministers, Dec. 24, 1798, *ibid.*, 263.

sumed," they wrote, "that the United States of America, who in their first treaty with Prussia had so clearly manifested the generous intention to withdraw, as much as possible, navigation and commerce from the effects of war, will not on this occasion evince a disposition less liberal than theirs, and we, therefore, believe that we can appeal with confidence to their ministers."⁴⁷ With this adjuration, they submitted their *projet* of a treaty. Adams suggested a few changes, omitting the stipulation that ships of war should not approach within cannon-shot of neutral vessels. This, he said, was seldom or never observed, and was difficult, if not impossible, of execution. A new *projet* including all of Adams's suggested amendments was then drawn and the treaty was signed July 11, 1799, on the thirty-second birthday of the American negotiator.

The first eleven articles of the treaty of 1785 were renewed in their entirety. Article 12 (free ships, free goods) was not renewed. The new twelfth article followed the Prussian suggestion that the whole matter be left for general negotiation after the war. Article 13 contained a short list of contraband articles (ship-timber omitted) which, however, were not to be confiscated, but to be detained and paid for, or delivered out. Article 14 was new and provided revised specifications for sea-letters. Article 15 was the same as that in the treaty of 1785, with the prohibition of approach eliminated. Article 16 permitted general embargoes. Articles 18 to 27 were the same as in the earlier treaty, except that Article 23 omitted the prohibition of privateering. The three great doctrines of the older policy were thus abandoned or suspended: free ships, free goods; the abolition of contraband, and of privateering. The negotiation had lasted more than a year. Writing to Pickering in September, 1798, John Adams stated that he was not at all mortified at the delay of the treaties with Prussia or Sweden, having "no ardent desire of any treaties till the crisis in Europe is more decided." "Our commerce is of more consequence to them than theirs to us; and with or without treaties, we shall have all we want."⁴⁸

The X, Y, Z affair and trouble generally with France made the renewal of the Prussian treaty a matter of little consequence, and not

⁴⁷ Prussian Ministers to Adams, Feb. 19, 1799, *ibid.*, 265.

⁴⁸ John Adams, Works, VIII, 595, 599.

desirable unless with material alteration. The treaty in duplicate, with French and English texts, was sent to the Senate by President Adams December 6, 1799, and referred to a select committee, of which Bingham was chairman. This committee advised ratification January 28, 1800, which was accomplished February 18 by a vote of twenty-six to six.⁴⁹ Ratifications were exchanged at Berlin June 22, 1800, and the treaty was finally proclaimed November 4, 1800. As its duration was for ten years after exchange of ratifications the treaty expired June 22, 1810, in the midst of the new series of international difficulties directly culminating in the War of 1812.

IV

THE TREATY OF 1828

John Quincy Adams was recalled from Berlin in 1801 at the President's suggestion. The legation was discontinued until 1835. Prussia sent a *chargé* to the United States in 1825. The renewal of the Prussian treaty in 1828 belongs to a new period of commercial treaty negotiations. The first treaty with Sweden had been for the most part renewed for eight years in 1816. The Prussian treaty had remained since 1810 without renewal. The new period begins with the recognition of the Latin-American Republics, with which commercial treaties were first made in the administration of John Quincy Adams. When Niederstetter, the new Prussian *chargé*, was presented in June, 1825, the President recalled that the relations between the United States and Prussia "had always been interesting and uninterruptedly friendly; that they had also been distinguished by the negotiations, at two different periods, of treaties in which the first examples had been exhibited to the world of national stipulations founded upon the most liberal principles of maritime and commercial law."⁵⁰ Recalling that Adams had favored the retention of the principal provisions of the treaty of 1785 and only reluctantly agreed to sign the treaty of 1799,

⁴⁹ Senate Executive Journal, I, 326-7, 337-40. Voting in the negative were Baldwin, Brown, Langdon, Mason, Nicholas, and Pinckney. Cf. Secretary Lansing to Von Bernstorff, March 2, 1916, special supplement to this JOURNAL, October, 1916, 392.

⁵⁰ John Quincy Adams's Memoirs, VII, 25.

as it departed from the lines of the earlier instrument, it is not surprising that the plan for a new treaty should have followed that of 1785 rather than that of 1799.

The world then was in the midst of the forty years' peace. British pretensions, against which the United States had ranged herself, had abated somewhat since the end of the Napoleonic Wars. The negotiation, of which the records are short, was comparatively simple. Clay proposed the revival of Articles 12 to 24, inclusive, of the treaty of 1798, and Article 12 of the treaty of 1785. To all of this Niederstetter consented. The provision in Article 23 of the treaty of 1785, prohibiting privateering, was also suggested by Clay. As to this Niederstetter had no instructions. The recently negotiated treaty with Sweden and Norway contained a provision relating to blockades, which provided that a vessel bound to a blockaded port should not be captured on its first attempt to enter the port, unless the vessel knew or ought to have known that the blockade was in force. This article Niederstetter proposed to have included, and the President acquiesced, although Clay desired a more precise definition of blockade, as to which the Prussian *chargé* had no instructions.

In general, the treaty, which was signed May 1, 1828, followed in Articles 1 to 11, inclusive, and Article 13, the recent treaty with Norway and Sweden. Article 12 renewed Article 12 of the treaty of 1785 and Articles 13 to 24, inclusive, of that of 1799, with the exception of the last paragraph of Article 19, which had reserved rights in favor of Great Britain under the Jay Treaty. More general reservations were now made which applied to all articles revived in favor of all the treaties of the United States made between 1810 and 1828. The vexed question of the status of private property at sea reappeared. While "free ships, free goods" was re-adopted, the provision against privateering was omitted, as was that abolishing contraband. The diversity of practice and opinion in 1799 continued in 1828. Therefore, Article 12 of the new treaty concluded with a renewed expression of the desire to see adopted "further provisions to ensure just protection and freedom to neutral navigation and commerce, advance the cause of civilization and humanity," and the engagement was made "to treat on this subject at some further and convenient period." Not until the Hague

and London Conferences was a "convenient period" presented. Unlike the earlier treaties with Prussia, the duration was for the term of twelve years, after which, if not previously denounced by one year's notice, the new treaty was to continue indefinitely.

V

THE TREATY FROM 1828 TO 1917

As the treaty of 1828 provided a method for termination by notice, there is no ground for reading into it what not only Treitschke, but Phillimore as well, said was to be understood in all treaties, the clause *rebus sic stantibus*.⁵¹ The maxim that every treaty is to be understood *rebus sic stantibus*, Wharton held to apply to all cases in which the reason for a treaty has failed or there has been such a change in circumstances as to make its performance impracticable except at an unreasonable sacrifice.⁵² When denouncement by notice may take place at any time, it is idle to take the position that a treaty is void through obsolescence. The purpose of a provision for unilateral denunciation is to furnish a way out of the inconvenience growing out of changed circumstances, an excellent example of which may be seen in the denunciation of the Russian treaty of 1832. If a treaty is actually impossible of performance, for whatever reason, whether because of the failure of status of one of the parties as a subject of international law, or because of the non-existence of the subject-matter, or because it is generally *functus officio*, the treaty drops of itself as a whole, the denunciation article included.

In but one provision of the treaty, that of Article 19 on neutral asylum for prizes, would it seem that a good argument might be made that the treaty is obsolete because in conflict with modern international law. Yet Kohler held that the whole of Article 13 of the treaty of 1799 (renewed in 1828), by which contraband was to be detained but not confiscated, was obsolete. "It contradicts the modern development of international law, as was expressly recognized by America at London," he says. Krauel, in discussing the *Frye* case, described the contraband

⁵¹ Phillimore, *International Law*, II, 58-59.

⁵² Wharton, *International Law Digest*, II, 58. Moore, *Digest*, V, 319.

article as a curiosity in international law, not binding upon Germany in the present war, and in opposition to the provisions of the German Prize Regulations of 1909. So also Fleischmann, defending the sinking of the *Lusitania*, argued that the treaty was no longer binding.⁵³

A sufficient answer to all these claims is that no one, prior to the present war, took any such position, and that in no official discussion of the treaty, either by Germany or the United States, was such a claim made; nor were any steps taken by either of the parties to denounce it by notice. Prussia recognized the validity of the treaties in 1861, our Civil War giving to its peculiar provisions "a practical meaning."⁵⁴ In 1870 the Prussian Government expressly recognized the binding force of Article 13 of 1799 (renewed in 1828) to the effect that contraband was not to be confiscated. In the proclamation of neutrality at the outbreak of the Franco-Prussian War, the validity of the article providing for asylum for prizes was specifically recognized by the United States.⁵⁵ In 1900 the German Chancellor stated that German commercial relations with the United States rested upon treaty-rights contained in the Prussian-American convention of 1828 and in similar agreements with the other German maritime states.⁵⁶

On the American side, the treaties are contained in the Statutes at Large, and in so far as not interfered with by later statutes, are a part of the law of the land. They were indirectly upheld in a recent decision of the United States Supreme Court (*United States v. Pulaski*, decided March 6, 1917). As international acts they have always appeared in the official compilations of the treaties in force.⁵⁷ Indeed, no intima-

⁵³ *Zeitschrift für Völkerrecht*, IX, 19, note; Krauel in same, 18-19; Fleischmann, in same, 172-3. Cf. B. Schmidt, *Über die Völkerrechtliche clausula rebus sic stantibus*, in Jellinek's *Staats- und Völkerrechtliche Abhandlungen*, Vol. VI, 25, whose statement, that international treaties are to be set aside because of changed circumstances only when the highest interest and aims of the state are necessarily involved, is quite as conservative as that of Wharton, and in striking contrast with other contemporary German writers like Heilborn and Ullmann.

⁵⁴ Circular of Prussian Minister of Commerce, Aug. 16, 1861, quoted by Niemeyer, *Urkundenbuch zum Seekriegsrecht*, I, 22.

⁵⁵ Moore, Digest, VII, 469. Richardson's Messages, VII, 87.

⁵⁶ Quoted by Niemeyer, 122.

⁵⁷ Niemeyer cites the appearance of the treaty in these official compilations as evidence that the United States regards them as still in force. Fleischmann says

tion can be found that the treaty was not binding upon Prussia down to the formation of the Empire, or upon the German Empire since that time, until the doctrine of *rebus sic stantibus* was raised against it in connection with the *Frye* case in Kohler's *Zeitschrift* in 1915, in the same number, indeed, in which Kohler asserted that international law based on international treaties can no longer be.⁵⁸

With the outbreak of the great war, the United States as a neutral was entitled to the benefits and burdened with the duties as set forth in the treaty of 1828 and the articles of the earlier treaties revived therein. It was not the first time that this had been the case, for Prussia had been a belligerent in 1866 and 1870, as the United States had been a belligerent and Prussia a neutral from 1861 to 1866. The provisions of the treaty covering the relations of neutrality, therefore, stand together as a standard of rights and duties for Germany and the United States between August, 1914, and April, 1917. These provisions are contained in Articles 12 of 1785, 13 to 20 of 1799, and 13 of 1828. The first is the famous "free ships, free goods" article. Going beyond the traditional statement of this principle, the article provided for complete liberty for either party to trade with a nation at war with the other to the extent that free intercourse and commerce of the neutral should not be interrupted. "On the contrary, *as in full peace*, the vessels of the neutral party may navigate freely to and from the ports or on the coasts of all belligerent parties." The treaty of 1785 did not recognize blockade, as that of 1828 did (Article 13). Similarly, the first treaty did not recognize contraband, as the last one did, by renewing Article 13 of 1799. Therefore, these three articles must be reconciled, and they may be as follows: the merchant vessels of the United States as a neutral had the right to navigate freely to and from the ports and on the coasts of Great Britain and her allies, save when a lawful blockade of a port or ports, properly notified and effectively maintained, had been declared, unless indeed such vessels carried contraband, which was limited to arms, ammunition, and military stores.

that Niemeyer's statement has no bearing upon the question of the validity of the treaty as against Germany.

⁵⁸ Kohler, *Das neue Völkerrecht*. See English translation and foreword in *Michigan Law Review*, June, 1917.

Even then the contraband was not to be confiscated, but could be requisitioned and paid for or delivered out. The inference is that neutral prizes could not be destroyed. Furthermore, the implication of the contraband article is that neutral merchantmen had the right to arm, for the "quantity of arms necessary for the use of the ship," and proper for the use "of every man serving on board the vessel or passenger" was to be free. Merchant vessels of the United States were to be guaranteed regulation of visitation and search, in which process German naval officers and sailors were not to "molest or insult in any manner whatever the people, vessels, or effects of the other party" (Article 15 of 1799, renewed in 1828). In case of blockade (Article 13 of 1828) the neutral merchantman might be "captured or condemned," or "detained or condemned," but not until after it had had actual warning or imputed knowledge of the blockade. Furthermore, the ports only, and not the coasts or waters contiguous to belligerent territory, are mentioned as subject to blockade. These are special treaty-rights in favor of the neutral. No provision seeks to limit the exercise by neutrals of rights existing by the unwritten law of nations. Those mentioned are either declaratory of international law or concessions beyond it by the belligerent in favor of the neutral.

The duties of neutrals are comprised in Article 19 of 1799 (renewed in 1828) on asylum for prizes. As has been seen, this article antedated the development of all modern doctrines of neutral duties.⁵⁹ The phrase used in the English version of 1828 states that "the vessels of war . . . shall carry freely wheresoever they please the vessels and effects taken from their enemies." The French versions of 1828, 1799, and 1785 used the same phrase as is used in Articles 36 of the Franco-British treaty of 1713: "*Les vaisseaux de guerre . . . pourront en toute liberté conduire où bon semblera les vaisseaux et leur marchandises qu'ils auront pris sur les Ennemies.*" The idea that prizes taken should be

⁵⁹ "The right of a belligerent to bring his prize to a neutral friend's harbour, and even to sell her there, appears to have been unquestioned before the eighteenth century, but it gave rise to difficulties. . . . In 1709 a claim made by a foreign power to adjudicate upon Englishman's prizes brought to its harbours was declared (by the High Court of Admiralty) to be unfounded and contrary to the law of nations." Law and Custom of the Sea (Naval Records Society, 1916, ed. Marsden), II, Introd. xii, xiv.

conducted by the belligerent war-ship into a neutral port is expressed in every treaty which contains a provision for the asylum of neutral prizes, so that the interpretation put upon the clause, first by Mr. Secretary Lansing, and afterwards by the Federal Court in the *Appam* case, is in complete accord not only with the historic expression of the principle, but also with the obligations of neutrality in modern international law.

A distinction must be drawn between the operation of changed circumstances upon a prior treaty, and the operation of a rule of law developed after the treaty was made. Changed circumstances may render the treaty inoperative, as stated by Wharton and Schmidt. A changed rule of law, on the other hand, may result in the limited operation of the treaty through construction. In the *Appam* case the second situation was presented. Asylum for prizes was a doctrine antedating the development of the modern law of neutral duties. Therefore, the provision in the treaty was to be strictly construed as in derogation of international law.

The Hague Convention, XIII of 1907, containing provisions relating to asylum for prizes, was ratified by the German Empire, with reservations as to Articles 11, 12, 13, and 20. The United States ratified it, with reservations as to Article 23 and as to the meaning of Article 3. Great Britain, making reservations as to Article 23, signed but never ratified the convention. Article 28 states that the provisions of the convention were not to apply except as to contracting Powers, "and then only if all the belligerents are parties to the convention." This would seem to dispose of the contention that the Hague Convention, as such, superseded the apparently conflicting provisions of the treaty with Prussia. Neither the United States nor Great Britain, as a matter of fact, made any such claim. It was only as a rule of international law, "now generally recognized and embodied" in Articles 21 and 22 of Convention XIII of 1907, that the British Government sought to have it applied to the *Appam* case. Because Article 23, having been adopted by a great majority of states, was alleged to be declaratory of international law, Germany appealed to the convention. Both Great Britain and Germany, therefore, held that in part Convention XIII was declaratory of international law. Articles 21 and 22 were ir-

reconcilable with Article 23. Mr. Lansing adopted the former, and properly, as the United States by the actions of its delegation at The Hague and of the Senate had rejected the latter. Judge Waddill, in giving judgment for the owners of the *Appam*, followed the interpretation of the Prussian treaty and of the status of the Hague Convention taken by the Department of State, and this position was followed by the Supreme Court in affirming the judgment of the court below.⁶⁶

Such being the principal provisions of the treaty respecting neutral rights and duties, it is somewhat surprising that they were not more frequently invoked by the United States while a neutral. The general silence of the American Government with reference to the treaty is significant. In the *Frye* case it was the German Government which suggested that Article 13 of 1799 (renewed in 1828) might govern. Thereupon the Secretary of State declared that the destruction of the *Frye* was a "violation of the obligations imposed upon the Imperial German Government under existing treaty stipulations between the United States and Prussia." It was, therefore, by virtue of its treaty-rights that the United States made claim for indemnity. No objection that the German lists of contraband were in opposition to the contraband list of 1799 (renewed in 1828) seems to have been made, nor was the claim made that destruction of neutral vessels was opposed to the treaty. More important is the omission of any reference to treaty-rights in Mr. Bryan's protest against Germany's proclamation of a war-zone around the British Isles. In no part of the German declaration of February 4, 1915, was the word "blockade" used or any phrase in any way describing a blockade. In the *Appam* case Germany claimed asylum under her alleged treaty-rights. The position of the United States that asylum for prizes is in derogation of international law, that the treaty article should be construed strictly, and that strict construction required that prizes be brought in by war-vessels, recognized the validity of the article but denied its applicability to the *Appam* case.

Only in general terms and incidentally did the United States refer to the repeated breaches of the treaty by Germany. In the first *Lusi-*

⁶⁶ The *Appam* case was fully discussed in the October number of this JOURNAL, 1916, 809-831. Cf. pp. 816-817.

tania note, May 13, 1915, Mr. Bryan called attention to the "explicit stipulations of our treaty of 1828," but founded no argument thereon. Many reasons may be found to explain this policy of silence with reference to what were plainly a series of violations of the treaty. A general standard of neutral rights was preferable to any special standard to be applied as against Germany, first, because Austria was properly to be held by the same standard as was Germany; second, that the same measure of neutral rights should be asserted against Great Britain as against Germany; and, finally, as the strongest and most important of the neutral nations, the United States should not claim special privileges for herself under the treaty, but seek to establish rights equally applicable to all neutral nations upon the broader basis of humanity. The submarine policy of Germany at once transcended the whole sphere of mere commercial regulations in time of war which the articles of the treaty having to do with neutrality sought to govern.

VI

THE TREATY SINCE APRIL 6, 1917

The provisions of the treaty fall into four classes: first, those which have to do with commercial intercourse in time of peace; second, those having to do with neutrality; third, those providing for a situation in which Germany and the United States should be at war together against a common enemy; fourth, those to be called into activity when Germany and the United States found themselves at war with each other. Upon the outbreak of war, April 6, 1917, the purely commercial regulations having to do with the regime of peace were, like all commercial treaties of that nature, abrogated. Those of the third class may be left to one side as irrelevant. Those of the second and fourth classes must be considered together, because the provisions which had to do with neutrality had a direct bearing upon those to be called into action after war began.

At first sight, Articles 23 and 24 of the treaty of 1785 (the first renewed in part in 1828, the second wholly renewed) seem to be separable from the rest of the treaty, because Article 24 concludes thus:

And it is declared that neither the pretence that war dissolves all treaties nor any other whatever shall be considered as annulling this and the next preceding article: but, on the contrary, that the state of war as precisely that for which they are provided and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.

There was such a persistent disregard of the articles of the treaty governing the rights of the United States as a neutral between August, 1914, and April, 1917, as to involve the whole treaty, because the same spirit underlies the whole. This position was seemingly recognized by Secretary Lansing, when, in answer to the proposal of the German Government, presented through the Minister of Switzerland, February 10, 1917, he stated that

this Government is seriously considering whether or not the Treaty of 1828 and the revived articles of the treaties of 1785 and 1799 have not been in effect abrogated by the German Government's flagrant violations of their provisions, for it would be manifestly unjust and inequitable to require one party to an agreement to observe its stipulations and to permit the other party to disregard them. It would appear that the mutuality of the undertaking has been destroyed by the conduct of the German authorities.

Anticipating that the severance of diplomatic relations between the United States and Germany might lead to war, the German Government proposed that Article 23 of 1799 renewed in 1828 should be reaffirmed. "This article," the German Foreign Office stated, "which is without question in full force as regards the relations between the German Empire and the United States, requires certain explanations and additions on account of the development of international law." Then was submitted the text of a special arrangement concerning the treatment of German and American nationals and their property in each other's territory after the severance of diplomatic relations. Germany proposed that German merchants in the United States and American merchants in Germany should be put on a par with the other persons mentioned in Article 23, namely, "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind." Germans in the

United States and Americans in Germany, it was proposed, should be free to leave the country of their residence, taking with them their personal property, including money, valuables, and bank accounts, within times and by routes to be specified. Resident enemy aliens were to be protected in person and property, without restrictions as to private rights, upon a plane of equality with resident neutral aliens. Patent rights were not to be void, or their exercise impeded; contracts between Germans and Americans were not to be canceled, avoided, or suspended, except as such action might be had with reference to neutrals. A specific recognition of the Sixth Hague Convention with reference to the treatment of enemy merchant ships at the outbreak of hostilities was also requested.

This plan had been suggested to Ambassador Gerard before he left Berlin, and his unwillingness to acquiesce in it gave rise to embarrassment and serious interference with his ambassadorial rights and functions. In declining to consider the proposition of the German Government, forwarded through the Swiss Minister, Mr. Lansing rehearsed the repeated and gross violations of the treaties while the United States was a neutral, and called attention to the fact that since the severance of relations between the two countries, American citizens had been prevented from removing freely from Germany. "While this is not a violation of the terms of the treaties mentioned," wrote Secretary Lansing, "it is a disregard of the reciprocal liberty of intercourse between the two countries in time of peace, and cannot be taken otherwise than as an indication of a purpose on the part of the German Government to disregard in the event of war the similar liberty of action provided for in Article 23 of the Treaty of 1799 — the very article which it is now proposed to interpret and supplement almost wholly in the interest of the large number of German subjects residing in the United States and enjoying in their persons or property the protection of the United States Government."

Franklin's favorite article, looking toward the humane treatment of prisoners of war, was not referred to in the German proposition. As yet but few opportunities have been offered for the purpose of testing this provision. In no sense, if we may believe the reports made upon the treatment of Allied prisoners in German prison camps, has the

spirit of Franklin's article been maintained toward the unfortunate French, British, and Russian prisoners of war; and there is no reason to believe from the reports which have been made of the treatment of the few Americans already in German camps that a new standard would be set up for Americans.

To the extent that Articles 23 and 24 are declaratory of international law, no one suggests that their provisions will be departed from by the United States, unless by way of reprisal. Nevertheless, the treaty as a whole is at an end. Conceived in the spirit of eighteenth-century enlightenment, phrased by Franklin and Adams "according to the laws of Nature and of Nature's God," the Prussian treaties have been diametrically opposed to the doctrines of an infallible State which justifies its policy under the guise of necessity. When the German armies invaded Belgium, they did so at the behest of a government which claimed that state policy was supreme over treaty faith. Until that policy is overthrown, treaties with such a state cannot exist. The statement of Kohler that "an international law based upon international treaties can no longer be," is a statement of Prussian policy against which the United States and the Allies are fighting: for the vindication of the doctrine that international society based upon international law and international treaties is the only international society worthy of the name. The general principles of Franklin's treaty have, in the main, remained unchanged. It is Germany that has changed. The treaty has fallen to the ground because of the Prussian doctrine that not even the most sacred treaties may stand in the way of the policy of the Prussian State.

JESSE S. REEVES.

COMMUNITY FINES AND COLLECTIVE RESPONSIBILITY

(Being Part XIII of Some Questions of International Law in the European War, continued from previous numbers of the JOURNAL.)

THE theory of collective responsibility for offenses committed by the civil population of occupied districts against the authority of the occupying belligerent has been interpreted in a wider sense and applied on a more extensive scale by German military commanders during the present war than was ever done in any war of the past. The punishments imposed in the application of the theory have been unprecedented in number, sometimes novel in form and often excessive in character. They have consisted of pecuniary fines, either direct or under the guise of contributions, the seizure and shooting of hostages, the burning of towns and villages, the destruction of private houses, the deportation of the civil population, the commercial isolation of refractory towns, the interdiction of public charitable relief to the unemployed, the confinement of the inhabitants within doors for certain periods, and the like.¹ It is the main purpose of this paper to review German theory and practice in respect to the first mentioned of these punitive expedients.

As a general principle, the right of a military occupant to impose, under certain conditions, pecuniary and other punishments upon occupied districts, for acts committed by the civil population against his authority, has long been recognized and acted upon in practice. Among the earlier instances of a resort to such a measure was the action of Napoleon, who, during his occupation of Lombardy in 1796, announced that any district under his occupation, in which firearms were found in possession of the inhabitants, should be liable to a fine equal to one-third its revenue (presumably the annual revenue).² A like penalty

¹ Some instances in which the three last mentioned expedients have been resorted to by the Germans in the present war were considered in my article on "Contributions, Requisitions and Compulsory Service in occupied Territory" in the January number, 1917, of this JOURNAL, especially pp. 104 ff.

² Hall, *International Law*, 4th ed., p. 492.

was threatened against any village in which a French soldier had been killed, unless the individual perpetrator of the crime was arrested and delivered up to the local authorities.³

It was not until the Franco-German War of 1870-71, however, that the theory of collective responsibility was applied on an extensive scale and interpreted to cover offenses for which the population punished could not have been justly held responsible. In August, 1870, a general order was issued by the Prussian military authorities decreeing that French communes in which hostile acts were committed against their authority by persons not belonging to the French army should be liable to a fine equal to the amount of the local land tax, and that those communes from which individual offenders came should be liable to the same punishment.⁴ In October of the same year it was announced that communes in which damage was done to railways, bridges, canals and telegraph lines, even when the mischief was wrought by others than the local inhabitants and without their knowledge and connivance, should be held responsible for such acts.⁵

These announcements turned out to be more than empty threats, for in fact huge fines were imposed and collected in many instances. Thus Lorraine, in addition to other penalties, was fined 10,000,000 francs for the destruction of a bridge with the alleged connivance of the inhabitants.⁶ In June, 1871, the village of Bray was fined 37,500 francs and hostages were taken to insure the payment of the fine.⁷ Combles was required to pay 325,000 francs for an offense not mentioned in the accounts, and Driencourt was assessed 1000 francs because a stranger was found in the village.⁸ The commune of Launois

³ Hall, *International Law*, 4th ed. p. 491.

⁴ Concerning this order see Bonfils, *Droit International*, sec. 1219; Calvo, *Droit International*, sec. 2236; Spaight, *War Rights on Land*, pp. 408-409; Merignhac, *Lois et Coutumes de la Guerre sur Terre*, sec. 106; Nys, *Droit International*, Vol. III, p. 429; Despagnet, *Cours de Droit International*, sec. 589; Bluntschli, *Droit Int. Cod.*, sec. 643 bis. The text of the above mentioned order may be found in the *Revue de Droit International et de Lég. Comp.*, Vol. II, p. 666; see the defense of this order, by Loening, *ibid.*, Vol. V, p. 77.

⁵ Edwards, *The Germans in France*, pp. 76, 211.

⁶ Edmonds and Oppenheim, *The Laws and Usages of War in the British Manual of Military Law* (ed. of 1914), p. 305.

⁷ Pradier-Fodéré, *Traité de Droit Int.*, Vol. VII, p. 281.

⁸ *Ibid.*, p. 279.

was forced to pay 10,000 francs to the families of two Prussian dragoons who were alleged to have been killed by *francs-tireurs*.⁹ Châtillon was fined 1,000,000 francs for the destruction of a bridge¹⁰; Etamps, 40,000 francs for the cutting of a telegraph wire¹¹; Orleans, 600,000 francs on account of the killing of a Prussian soldier by an unknown person during an altercation between himself and the soldier.¹² St. Germain was given the option of paying a fine of 100,000 francs or of being burned because three German dragoons had disappeared from the community.

In some instances impositions were levied which in form and pretext were fines, but which in reality were contributions in disguise. The enormity of the amounts and their disproportion to the offenses alleged would seem to leave no doubt as to this.¹³ Thus, the Department of the Seine was assessed 24,000,000 francs and Rouen was required to raise 6,500,000 francs within five days.¹⁴ The Departments of Aisne, Ardennes and Aube were compelled to pay 3,000,000 francs as a punishment for the action of the French in taking as prisoners of war the crews of captured German merchant vessels and for expelling Germans from France. The Departments of Meurthe, Meuse and Seine-et-Marne were assessed 2,755,253 francs on the same account.¹⁵ A contribution, which was intended as a punitive measure, was the levy in December, 1870, of 25 francs per capita on the inhabitants of all the occupied districts of France with the avowed purpose of breaking the resistance of the French people and of inducing them to sue for peace.¹⁶

⁹ Spaight, *op. cit.*, p. 409.

¹⁰ Bonfils, *op. cit.*, sec. 1219; Ferrand, *Des Réquisitions*, p. 239, and Guelle, *Précis des Lois de la Guerre*, Vol. II, p. 221. Guelle states that the village of Ham was fined 25,000 francs because the fortress was retaken from the Germans by a detachment of regular French troops. See also Latifi, *Effects of War on Private Property*, p. 34, and Rouard de Card, *La Guerre Continentale*, p. 178.

¹¹ Guelle, p. 221.

¹² Bonfils, *op. cit.*, sec. 1219, and Depambour, *L'Occupation en Temps de Guerre*, p. 119.

¹³ Compare Guelle, Vol. II, p. 221.

¹⁴ Depambour, p. 119, and Rouard de Card, p. 178.

¹⁵ Calvo, *op. cit.*, Vol. IV, sec. 2236. Bismarck considered the action of the French to be a violation of international law, but as the law then stood, the crews of merchant vessels were liable to be treated as prisoners. Compare Edmonds and Oppenheim, in the *British Manual*, sec. 459, note b.

¹⁶ Bonfils, sec. 1222, and Ferrand, *Des Réquisitions en Matière de Droit Int.*, p. 221. Other instances of fines imposed are mentioned by Andler in his brochure,

Punishments other than fines were laid in some instances. Thus, when the railroad bridge over the Moselle between Nancy and Toul was blown up, whether by civilian inhabitants or French troops is not clear, the town of Fontenoy was burned by the Germans.¹⁷ At Charmes the town casino was burned as a punishment for the act of the inhabitants in firing upon the escort of a convoy of prisoners.¹⁸

The German theory of collective responsibility was revived by Lord Roberts and General Kitchener in the South African War, when communities were held responsible and were punished not only by heavy fines but by wholesale burning of farms, the destruction of private houses and the imprisonment of the leading civil inhabitants, for damages committed upon railway and telegraph lines by "small parties of raiders." It is not clear whether the offenders were lawful belligerents or non-combatants: in the former case their acts were not violations of the laws of war and therefore they were not legally punishable.¹⁹ In any case the measures resorted to were extremely severe and of very doubtful expediency, as such measures always are, because they tend to drive the enemy to desperation, embitter the whole population and thus retard rather than hasten the termination of the war. Such measures were not resorted to during the Chino-Japanese, the Spanish-American, nor the Russo-Japanese Wars, and apparently not during the more recent Turco-Italian and Balkan Wars.

During the present war the Germans have, as already stated, extended the theory of collective responsibility and applied it on a larger scale and under a greater variety of forms than was ever done in any previous war.²⁰

Les Usages de la Guerre et la Doctrine de l'Etat-Major Allemand, p. 25, and by Saint Yves, *Les Responsabilités de l'Allemagne dans La Guerre de 1914*, pp. 383 ff.

¹⁷ Spaight, p. 122, and Guelle, p. 221. Pillet (*Le Droit de la Guerre*, p. 236) declares that the bridge was destroyed, not by civilians, but by French troops; consequently it was a legitimate act of warfare.

¹⁸ Edmonds and Oppenheim, *op. cit.*, p. 305, note b.

¹⁹ Spaight, p. 124; Bordwell, p. 150. See especially the proclamation of Lord Roberts of June 14, 1900, announcing that houses and farms in the vicinity of places where damage was done would be burned; and that of General Maxwell of June 15, 1900, declaring that in case telegraph wires were cut or railway bridges destroyed the farm nearest the place where the act was committed would be burned.

²⁰ With a view to establishing the liability of Belgian communes for damages

The following instances, the facts regarding which seem to be sufficiently established, illustrate fairly well the German theory and practice:

In November, 1914, the city of Brussels was fined 5,000,000 francs by General von Leutwitz for the act of a policeman in attacking a German officer during the course of a dispute between the two, and for facilitating the escape of a prisoner.²¹ In July, 1915, another fine of 5,000,000 francs was reported to have been imposed upon Brussels for the alleged destruction of a German Zeppelin by a British aviator at Eyre near Brussels.²²

According to a press despatch of November 8, 1914, from The Hague, the affair which led to the imposition of the first mentioned

done by the inhabitants and for determining the amounts for which they should be held responsible, the Governor-General of Belgium in August, 1914, revived and declared in force the old French law of 1795, which makes the communes responsible for damages caused by riots and public disorders therein. The claim of the Governor-General to do this was based on the fact that the law in question was enacted when what is now Belgium was a part of France and had never been repealed by the Belgian Parliament. The original purpose of the law of 1795, however, was to establish the responsibility of the communes for damages caused by riots and public disturbances (*attroupements*) in time of peace and not those caused by acts of individuals in time of war in territory occupied by the enemy. There is no analogy, therefore, between the responsibility contemplated by the French law and that which the Governor-General of Belgium sought to establish. Compare Pillet, *Le Droit de la Guerre*, p. 235. By a decree of July 3, 1915, the Governor-General created in each province a special tribunal charged with the enforcement of the earlier decree. The tribunals were empowered to examine witnesses, employ experts, conduct investigations and to fix the amount of the damages wrought, which amount was to be paid by the commune to the provincial treasurer within ten days, who was thereupon required to transmit the amount to the parties injured. Text in Huberich and Speyer, *German Legislation in Belgium*, 2d series, pp. 57-59. On the face of it, the primary purpose of this measure was to provide a means for indemnifying the Belgian population, but it is not improbable that it was also intended to provide machinery for punishing communes for acts of hostility committed by individuals against the authority of the occupying forces.

²¹ The notice imposing the fine was posted at Brussels, November 1, 1914. The text may be found in various collections of proclamations issued in Belgium, among others the Report of the Belgium Commission of Inquiry. The notice states that the policeman in question was sentenced to imprisonment for a term of five years and that "The city of Brussels, excluding suburbs, has been punished for the crime committed by its policeman De Ryckere against a German soldier, by an additional fine of five million francs."

²² The application of the principle of collective responsibility in this case seems so extraordinary that one is tempted to doubt the authenticity of the report.

fine grew out of the attempt of the German military authorities to prevent the sale of "contraband" newspapers. A German secret service agent, it appears, undertook to arrest certain Belgians for selling Dutch newspapers contrary to the regulations; the latter resisted arrest and were supported by the policeman in question who, it is alleged, attacked the German officer. The Brussels municipal council protested against the fine, among other reasons, because the military authorities had not notified the local news-dealers of the order prohibiting the sale of Dutch newspapers, and because the persons who resisted arrest did not know that the secret service agent was a German officer.

In July, 1915, Brussels was again fined 5,000,000 marks in consequence of a "patriotic demonstration" by the inhabitants on July 21st, the national holiday, the "moderate size of the fine imposed being due to the loyal coöperation of the municipal authorities in preserving order."²³ The mayor addressed a protest to the Governor-General, von Bissing, in which he denied the right of a military occupant to punish the civil population for manifesting their sentiments of patriotism on the occasion of the celebration of their national independence.²⁴

Early in 1916 Brussels was fined 500,000 marks, and the suburb

²³ Lieutenant-General Hut, German Governor of Brussels, in a letter to the mayor, stated that the municipal authorities had given their approval to the regulations prohibiting all public demonstrations, meetings, processions and display of flags on the fête day of July 21st, but that in spite of this agreement, late in the evening disturbances were created by the distribution of tracts urging the people to disregard the regulations. During the evening Cardinal Mercier drove through the streets, and his appearance led to demonstrations "which were contrary to the German regulations and which had the effect of inciting the people to rebellion or foolish deeds." "No occupying Power," said General Hut in his letter to the mayor, "would bear a similar challenge. I therefore proposed to the Governor-General to fine the community. The Governor accepted the proposal and imposed a fine of 5,000,000 marks. The Governor remarked: 'It is only in consideration of the loyal coöperation of the municipal authorities in preserving order that the fine laid is so moderate.'" Massart (Belgians under the German Eagle, p. 275) says the Germans even went to the length of announcing that the closing of stores on the national holiday would be regarded as a forbidden "demonstration," but this portion of the order they were unable to enforce in Brussels or elsewhere.

²⁴ The town of Lierre was fined 57,500 francs for a similar "demonstration" on the same day, the chief offense, it is alleged, being the raising of a Belgian tri-color on the top of an oak tree.

of Schaerbeek 50,000 marks, in consequence of the murder by an unknown person of a young Belgian in the latter commune on the night of January 6th.²⁵ Brussels was held partly responsible because the crime was alleged to have been committed with a revolver obtained in that city, notwithstanding the fact that the German authorities had, on January 1st, issued a proclamation requiring all persons to deliver up their fire arms and munitions at the city hall, and threatening with the death penalty those found with arms in their possession after a fixed date.²⁶ The proclamation also notified the inhabitants that communes in which such persons were found would be fined 10,000 marks for every offender taken therein.

Numerous towns and cities were fined for the alleged firing by *francs-tireurs* and civilians upon German troops and for other offenses against the occupying authorities. Thus Louvain was fined 20,000,000 francs in consequence of shots alleged to have been fired by civilians.²⁷

A levy of 60,000,000 francs was made upon the Province of Liège shortly after it fell under the occupation of the Germans, but it is not quite clear whether it was intended as a fine or a contribution.²⁸ Subsequently a levy of 10,000,000 francs was imposed on the city of Liège in consequence of the alleged firing of shots from private houses upon German troops. Mons was compelled to pay 100,000 francs for the firing by an unknown person upon a German soldier, and the town

²⁵ The murdered Belgian was said to have been the person who had furnished the German authorities with information which led to the arrest and execution of Miss Edith Cavell, an English nurse, on the charge of assisting English soldiers to escape from Belgium. He was, therefore, regarded by the Belgian people as a traitor and his murder was apparently brought about by a secret society which had sworn vengeance against Miss Cavell's betrayer.

²⁶ Compare the following from a proclamation, issued in October, 1915, by General Sauberweig:

"If, after October 25th, arms and ammunition are found in possession of any inhabitants those persons will be liable to the death penalty, or to hard labor for at least ten years, while the communities will be fined up to 10,000 francs for each case."

²⁷ The German White Book, *Die Völkerrechtswidrigen Führung des Belgischen Volkskriege*, p. 241 says, however, that it was impossible to collect this fine.

²⁸ It is variously described in the press despatches as a "fine," a "contribution," and a "war levy." It makes little difference whether technically it was a fine or a contribution, for many of the "fines" imposed by the Germans were in fact "contributions" in disguise.

was threatened with another fine in case a certain Englishman should be found within its limits.²⁹ The town was threatened with another fine in case any inhabitant should be found within its limits with benzine or a motor cycle in his possession, and a similar threat to fine the Province of Hainaut for the same offense was made.³⁰ In June, 1917, Mons, according to the press dispatches, was again fined 500,000 francs because a Belgian paper published in Holland stated that Crown Prince Rupprecht of Bavaria was in Mons when the city was bombarded by Allied airmen.³¹

Tournai is said to have been fined 3,000,000 francs for the killing of a Uhlan.³² Merris and La Gorgue were each fined 50,000 francs for the firing of shots at German troops; the village of Marson (population 300) 3000 francs, and the commune of Warnelon 10,000 francs for the same offense.³³ The commune of Cortemarck was fined 5000 marks on the pretext that one of the inhabitants had committed espionage by making signals to the enemy.³⁴ In the case of Marson, the Germans promised "to burn only a part of the village in the event the fine was duly paid."

On January 16, 1915, the Belgian Legation at Washington issued a public statement charging the Germans with having imposed a fine of 10,000,000 francs on the city of Courtrai, not for the disobedience of the inhabitants, but for obeying the orders of the military commander.³⁵

²⁹ Massart, *Belgians under the German Eagle*, p. 147. Proclamation posted at Mons, November 6, 1914.

³⁰ Proclamation posted at Mons, Oct. 6, 1914, Massart, p. 147.

³¹ *New York Times*, June 8, 1917, despatch from Amsterdam. Were there not clearly established instances of the imposition of fines by the Germans in other cases where the element of community guilt was totally lacking, one would be inclined to regard this dispatch as a joke.

³² *London Times*, September 25, 1914.

³³ Ferrand *Des Réquisitions en Matière de Droit Int.* (1917), p. 415, and Morgan, *German Atrocities*, p. 85. Morgan asserts that these levies were not fines in reality, but "pure extortions levied on mere pretense."

³⁴ Text of the notice, in Massart, p. 153. The curé and the vicar of the commune were held "responsible for the members of the parish" and were punished by deportation to Germany.

³⁵ According to the Belgian version, the inhabitants had been ordered by two German officers shortly after the occupation of the city to deliver up their arms in the tower of Broel. Subsequently a new commander arrived who charged that the

For the cutting of a telephone wire by unknown persons at Arlon, the town was fined 100,000 francs and given four hours in which to raise the amount, in default of which 100 houses were to be pillaged. Before the sum was raised 47 houses are alleged to have been sacked.³⁵ The commune of Puers was fined 3000 francs for a similar offense. The local authorities, however, claimed that the wire had not been cut, but had given way through wear. Other towns fined on the charge that the telegraph or telephone systems "did not work properly" were Ghent, 100,000 marks; Ledebourg, 5000 marks; Destelbergen, 30,000 marks; Schellebelle, 50,000 marks; Sweveghem, 4900 marks; Winckel Sainte-Croix, 3000 marks; and Wachtebeke, 3000 marks.³⁶ Seraing was fined because a bomb had burst within the limits of the commune, and Eppeghem was punished (by a fine of 10,000 francs) on the charge that a peasant had fired a shot at a hare or a pigeon.³⁷

A fine of 20,000 marks was imposed on the town of Malines for the failure of the mayor to notify the military authorities of a journey which Cardinal Mercier had made in violation of the German regulations concerning the circulation of automobiles.³⁸ The same town was threatened with a fine in case the authorities did not furnish the Germans within 24 hours a list of the employés of the railway administration in order that they might be requisitioned for labor.³⁹

arms had been clandestinely deposited at the tower without instructions from the military authorities. The city was thereupon fined 10,000,000 francs. Von Mach (Germany's Point of View, p. 195) ridicules the Belgian explanation, and defends the imposition of the fine as a legitimate and humane punishment.

³⁵ Reports on Violations of the Laws and Customs of War in Belgium, preface by J. Van Den Heuvel, p. xxvi; also p. 58; see also Saint Yves, *Les Responsabilités de l'Allemagne dans la Guerre de 1914*, p. 385.

³⁶ Massart, p. 146, quoting the *Nieuwe Rotterdamsche Courant* of January 30, 1915.

³⁷ Massart, pp. 147-148. The Belgian accounts charge that the shot was in fact fired by a German soldier while walking in the country. Hostages were taken to insure the payment of the fine, but as there was no money in the communal treasury, the hostages were subsequently released and apparently the fine was remitted.

³⁸ Annex IV to Cardinal Mercier's address to the Cardinals, Archbishops and Bishops of Germany, Bavaria and Austria-Hungary, published in a brochure entitled "An Appeal to Truth," p. 26.

³⁹ The mayor replied that the local authorities, not being charged with the administration of the railways, did not possess the information demanded.

Antwerp is said to have been fined 25,000 francs because an unknown person altered the letters in a public notice posted by the Germans announcing the capture of 52,000 Russians and 400 guns, so as to make it read "52,000 sparrows and 400 nuns."⁴⁰

The village of Grenbergen was assessed 5000 francs because an inhabitant allowed his pigeons to fly in violation of the military regulations.⁴¹

On August 22, 1914, General von Nieber imposed a fine of 3,000,000 francs on the town of Wavre (population 8500) for the "unqualified behavior, contrary to the law of nations and the usages of war, of the inhabitants in making a surprise attack on the German troops." The town was given a week in which to raise the amount. In a letter of August 27, General von Nieber informed the mayor as follows: "I draw the attention of the town to the fact that in no case can it count on further delay, as the civil population has put itself outside the law of nations by firing on the German troops. The city will be burned and destroyed if the fine is not paid in due time, without regard for any one; the innocent will suffer with the guilty."⁴² The Belgian accounts state that in consequence of the inability of the town to raise the amount a large number of houses were burnt.⁴³ Professor Waxweiler affirms that the civil population took no part in the hostilities and that a medical inquiry established the fact that the German soldier who had been wounded during the course of the affair received his wound from a German bullet.⁴⁴

Lessines is alleged to have been subjected to a "heavy fine" because the women of the town declined to do military work for the Germans. Other towns were fined or otherwise punished for the refusal of the inhabitants to perform what the Belgians regarded as military work or for attempting to dissuade their fellow citizens from performing

⁴⁰ Massart, p. 148.

⁴¹ *Ibid.*, p. 147.

⁴² Text in the Belgian Reports on Violations, etc., p. 37. See also Dampierre, *l'Allemagne et le Droit des Gens*, p. 148, and Saint Yves, *op. cit.*, p. 385. Some of the accounts say the fine was imposed by General von Bülow.

⁴³ Facts about Belgium, p. 7. Grasshoff, a German writer (*The Tragedy of Belgium*, p. 173), alleges, however, that the threat was not executed and that the city was spared from burning.

⁴⁴ Belgium, Neutral and Loyal, p. 281.

such labor.⁴⁶ Collective fines (10,000 francs in each case) were also threatened for the failure of the owners of horses to bring in their animals at the direction of German agents who were sent to Belgium to requisition horses for transportation to Germany. Besides, an individual fine of 500 francs was to be imposed upon each owner who refused to comply with the order.⁴⁶

During the autumn of 1916 many towns and communes were fined in consequence of the refusal of the civil authorities to furnish the Germans with lists of the "unemployed" whom the military authorities were then deporting in large numbers to Germany for compulsory labor. Thus, Bruges was threatened with a fine of 150,000 marks for each day's delay in the furnishing of such a list. The authorities refused to furnish the list, and the fine was imposed and paid.⁴⁷ Tournai, which had already in 1914 been fined 3,000,000 francs for the killing of a German Uhlan, was now assessed 200,000 marks for the refusal of the civil authorities to furnish the Germans with a list of all the male inhabitants of the town, and a further fine of 20,000 marks was threatened for each day's delay in the furnishing of the information demanded.⁴⁸

⁴⁶ Some instances are mentioned in my article in the January, 1917, number of this JOURNAL, pp. 103 ff. The Belgian Government furnished a correspondent of the *New York Times* a facsimile copy of the following military notice addressed to the population of the village of Ledeborg, near Ghent:

Ghent, 16th December, 1915.

To the Mayor of Ledeborg:

The following is Paragraph 4 of the regulations dated 12th October, 1915:

It is forbidden to the inhabitants of Ledeborg parish to use the public streets between 7 P.M. and 8 A.M. from 17th December till 24th December, 1915, inclusive. You are directed to inform the public immediately of the present regulation.

Furthermore, you are informed herewith that police measures and fines will follow in case the workmen requisitioned for the railway workshops at Ledeborg persist in their refusal to resume work on account of the German military administration.

Commandant d'Etape, Von Wick.

⁴⁶ See my article in the January, 1917, number of this JOURNAL, p. 90; also Ferrand, *Des Réquisitions*, p. 437.

⁴⁷ *London Times* (weekly ed.), Nov. 3, 1916.

⁴⁸ *New York Times*, November 18, 1916. Major-General Hoppfer, who imposed the fine, replied in a letter of October 23d to a resolution of the municipal council declining to furnish the list, as follows: "The fact that the municipal

In some instances confiscations under the guise of fines appear to have been imposed on private individuals of wealth. Thus Baron Lambert de Rothschild is said to have been "mulcted" for 10,000,000 francs, and M. Solvay, the well-known Belgian manufacturer, was compelled to pay 30,000,000 francs.⁴⁸

In the occupied districts of France the same policy was followed by the Germans, and many towns and communes were fined for acts alleged to have been committed by the inhabitants against the authority of the occupying forces. Thus, in August, 1914, the commune of Lunéville was fined 650,000 francs for an alleged attack by certain of the inhabitants against the German troops.⁴⁹ The French authorities, however, council allows itself to oppose the orders of the military authorities in occupied territory constitutes an act of arrogance without precedence and is an absolute misunderstanding of the situation arising from the state of war.

"The state of affairs is clearly and simply this: The military authority commands and the municipality has to obey. If it fails to do this, it will have to support the heavy consequences which I have already pointed out in my previous explanation.

"The commander of the army has imposed on the town for its refusal to supply the required lists a fine of 200,000 marks, which has to be paid within the next six days, and he further adds that until the required lists have been put at his disposal the sum of 20,000 marks will have to be paid for every day of delay. This will hold good until December 31."

⁴⁸ Sarolea, *How Belgium Saved Europe*, pp. 140-1. Sarolea refers to these exactions as "fines" without stating what the offenses were for which they were laid. Apparently they were nothing more than acts of confiscation.

⁴⁹ The following notice concerning the fine was posted by the German authorities throughout the commune:

"On the 25th August, 1914, the inhabitants of Lunéville made an attack by ambuscade against the German columns and transports. On the same day the inhabitants fired on hospital buildings marked with the Red Cross. Further, shots were fired on the German wounded and the military hospital containing a German ambulance. On account of these acts of hostility a contribution of 650,000 francs is imposed on the commune of Lunéville. The mayor is ordered to pay this sum — 50,000 francs in silver and the remainder in gold — on the 6th of September at 9 o'clock in the morning to the representative of the German military authority. No protest will be considered. No extension of time will be granted. If the commune does not punctually obey the order to pay 650,000 francs, all the goods which are available will be seized. In case payment is not made, domiciliary searches will take place and all the inhabitants will be searched. Anyone who shall have deliberately hidden money or shall have attempted to hide his goods from the seizure of the military authorities, or who seeks to leave the town, will be shot. The mayor and hostages taken by the military authorities will be made responsible for the

emphatically denied the truth of the charge, and accused the Germans not only of having themselves fired the shots complained of, but with having also massacred 18 inhabitants of the town and burned 70 houses.

Upon the occupation of Rheims, the Germans levied an "exorbitant indemnity" on the city, but it is not clear whether it was intended as a fine or a contribution. The amount was finally cut down to 150,000 francs in gold and a quantity of supplies of the value of 800,000 francs. Hostages were taken to insure the payment within four days of the sum required.⁵¹

Lille was fined 500,000 francs because the inhabitants made a demonstration of sympathy for a detachment of French prisoners who were being escorted through the streets by a German military guard. The city was allowed one week in which to raise the amount of the fine.⁵²

The town of Epernay was fined 176,550 francs in September, 1914, for not having delivered within the time specified certain supplies which the German military authorities had requisitioned for the use of their troops. The notice of the fine was accompanied by a threat to "take the most rigorous proceedings against the population itself and to conduct forcible perquisitions in the houses of the inhabitants" in case the amount was not paid on the following day. The mayor protested against the fine on the ground that certain of the supplies requisitioned (notably 12,000 kilogrammes of salted bacon) were not to be found in the town although he had used all his endeavors to procure them. The German authorities could not, however, be induced to exact execution of the above order. The mayor is ordered to publish these directions to the commune at once."

Hénaménil. 3d September, 1914.

Commander-in-Chief, Von FASBENDER.

The text of this notice may be found in the Report of the French Official Commission of Inquiry on Violations of International Law in French Territory occupied by the Enemy, *Journal Officiel*, January 8, 1915. A facsimile reproduction in French may be found in a collection entitled *Scraps of Paper: German Proclamations in Belgium and France* (p. 11), published by Hodder and Stoughton, London, 1917; in Dampierre, *l'Allemagne et le Droit des Gens*, p. 149; and in various other publications.

⁵¹ Wood, *The Note Book of an Attaché*, p. 168.

⁵² Press dispatches of March 12, 1915. The Department of the Nord had already been subjected to a contribution of 15,000,000 francs, in addition to a monthly contribution of 2,000,000 francs. About half of the burden fell upon Lille. Lille, *Sous le Joug Allemand* (Paris, 1916), p. 4.

relinquish the fine or reduce the amount, and an appeal was made by the mayor to the inhabitants to raise the sum demanded.⁵³ The amount was collected and turned over to the German authorities at 5 o'clock on the day fixed.

Erbéville and other places were fined on the charge that shots were fired by civilians at German soldiers.⁵⁴

A curious application of the German theory of collective responsibility was the reported imposition of a fine on Lens in consequence of the bombardment of the town by the Entente Allies during its occupation by the Germans. It appears from the news dispatches that the punishment was based on the assumption that certain of the inhabitants must have been in communication with the enemies of Germany and induced or invited the bombardment. Six shells fell on the railroad station, for each of which a fine of 3750 francs was imposed.

Punishments other than pecuniary fines were as in Belgium laid upon French towns in various instances.⁵⁵

In other territories occupied by the Germans the policy of collective responsibility and punishment was applied as in Belgium and France. Thus, a fine of 50,000 rubles (about \$25,000) was imposed on the inhabitants of the Russian town of Windau, the amount being worked out by the inhabitants on the roads, bridges and farms. Vilna was fined 75,000 marks in consequence of a fire alleged to have been started by one of the inhabitants. Soon after their occupation of Russian Poland, the Germans, in retaliation for the alleged destruction by Russian troops of private property in East Prussia, announced that Polish towns occupied by them would be heavily fined, and for every village burned by the Russians in German territory and for each estate destroyed, three villages or estates in Russian territory would be sacrificed to the flames.

⁵³ Facsimile reproduction of the order in *Scraps of Paper*, etc., p. 23; see also Matot, *Rheims et la Marne*, *Almanach de la Guerre*, p. 169.

⁵⁴ Saint Yves, *op. cit.*, p. 387.

⁵⁵ Thus the entire population of Roulers was compelled to remain indoors from 2 P.M. until 8 P.M. every day for three weeks because one of the inhabitants was found guilty of giving food to Russian prisoners employed by the Germans at work in the vicinity of the town. *London Times* (weekly ed.), June 23, 1916, quoting from the *Amsterdam Telegraf*.

Upon their occupation of Bucharest in December, 1916, a heavy pecuniary imposition was levied upon the Roumanian capital, and a similar exaction amounting to 50,000,000 francs is said to have been laid on the town of Craiova.⁵⁶ In June, 1917, a fine of 250,000,000 francs was imposed in the occupied territory of Roumania.^{56a}

It is probably safe to assume that the charges against the Germans for levying exorbitant fines upon communities, like many other charges made against them, have been exaggerated, and that in some instances where pecuniary exactions were actually levied they were not intended as punitive measures, but were contributions levied ostensibly, at any rate, for the "needs of the occupying troops."⁵⁷ Nevertheless, when reasonable allowance has been made for exaggeration and errors of statement, there remains sufficient evidence of a reliable character to warrant the conclusion that the charges are in the main true, and that a policy of pecuniary repression has been carried out on so large a scale as to afford some basis for the assertion that it partook of the character of spoliation.

We may now examine in the light of the international conventions, the opinions of the text writers and the principles of the criminal law the question of the legality of the German policy. The great majority of American, English and French writers on international law have condemned as arbitrary and contrary to the elementary principles of justice the theory of collective responsibility as it was applied by the Germans in many instances during the war of 1870-71, particularly where it was applied to districts other than those in which the offense was committed, where the amount of the fine was out of all proportion

⁵⁶ *London Times* (weekly ed.), Dec. 15, 1916. These levies were variously described in the press dispatches as "contributions," "war levies" and "fines." It is impossible to determine their technical character, nor is this important, for the reason that the Germans do not seem to have observed strictly the distinction between fines and contributions.

^{56a} *New York Times*, June 26, 1917.

⁵⁷ Von Mach ventures the explanation that many of the so-called "indemnities" levied by the Germans were nothing more than taxes imposed for meeting the expenses of the civil administration. *Germany's Point of View*, p. 194. In this article I have made a conscientious endeavor to avoid confusing fines with contributions and taxes, and with one or two exceptions where there is doubt as to the exact character of the imposition, I have dealt only with fines.

to the gravity of the offense, where the acts complained of were committed not by the civil population but by the regular troops of the enemy, as appears to have sometimes been the case, and where the fines levied were imposed for the psychological purpose of inducing the population to cease their resistance and sue for peace.⁶⁰

Even a few German writers, such as Bluntschli,⁶¹ Geffcken,⁶² Loening⁶³ and apparently Albert Zorn, admit that in some instances the

⁶⁰ See, for example, Bordwell, *Law of War*, p. 317; Lawrence, *Principles*, p. 448; Spaight, *op. cit.*, p. 408; Westlake, *International Law*, Vol. II, p. 96; Bonfilis, *op. cit.*, sec. 1219; Despagnet, *op. cit.*, sec. 589; Ferrand, *Des Réquisitions*, pp. 239 ff.; Feraud-Giraud, *Des Réquisitions Militaires*, p. 17; Merignhac, *Les Lois et Coutumes*, sec. 106; Nys, *Droit Int.*, Vol. III, p. 429; Guelle, *Précis*, Vol. II, p. 219; Latifi, *op. cit.*, p. 34; Pillet, *Le Droit de la Guerre*, pp. 234 ff. See also Calvo, *op. cit.*, Vol. IV, sec. 2172, and G. F. DeMartens, *Traité*, Vol. III, p. 265. Rolin Jaquemyns, a Belgian jurist, defends in general the German policy of 1870-71, although he condemns as unjustifiable the punishment of communes other than those in which offenses were committed. See the *Revue de Droit Int. et de Lég. Comp.*, Vol. II, pp. 666 ff. and Vol. III, pp. 311 ff. ⁶¹ *Droit Int. Cod.* (Fr. trans. by Lardy), sec. 643 bis.

⁶² See his note (no. 7) to sec. 126 of Heffter where he says it must be admitted that the Germans went beyond the necessities of the war in holding responsible distant communes from which the offender originally came. Their action in compelling the municipal authorities to furnish information to the nearest military commander concerning infractions and in punishing communes for giving shelter to offenders, Geffcken says was unjustifiable, since the occupying belligerent has no right to require the civil authorities to act as agents for the commanders of the invading army.

⁶³ See his article *l'Administration du Gouvernement-Général de l'Alsace Durant la Guerre de 1870-71* in the *Revue de Droit Int. et de Lég. Comp.*, Vol. V (1873), p. 77. Loening defends the action of the Germans in imposing a fine equal to the amount of the local land tax on districts in which offenses were committed against the safety of the German army by persons not belonging to the French army. The effect he says was "remarkable" and was the means of preventing many wrongs. "It therefore marked a great progress in the penal law of war." He also defends the 25 franc per capita levy for the purpose of breaking the resistance of the French and bringing pressure on them to sue for peace. But the Germans went too far, he says, when they extended the principle of collective responsibility to communes from which the offenders came, because in most cases there was no relation between the offense and the commune punished. The commune punished in such cases, he very properly adds, possessed no authority over its inhabitants such as the German theory assumed, and consequently the punishment fell upon persons who not only took no part in the acts committed but who were powerless to prevent them (p. 78). Loening asserts, however, that there was no reported instance in fact in which such a commune was fined; the German order was, therefore, only an unexecuted threat, and as matters turned out the Germans cannot be reproached.

German commanders pushed the theory of collective responsibility too far. The majority of German writers, however, have attempted to justify without exception the punitive measures resorted to by the German commanders in 1870-71. Leuder finds a justification in the embittered character which the war took on in its later stages and in the determined resistance of the French people after it had become evident that their success was hopeless,⁶² and this defense is relied upon by the *Kriegsbrauch im Landkriege*, which adds that experience shows pecuniary penalties to be the most effective means of insuring the obedience of the civil population.⁶³ Regarding the charge that the amount of the fines levied was excessive in many instances, Leuder remarks that the promptness with which they were paid is evidence enough that they were "in truth not too exorbitant."⁶⁴ He even goes to the length of holding that communities may be fined for the continued persistence of the inhabitants in keeping up a struggle in which there is no hope of success (*durch frivol fortgesetzte Kriege*).⁶⁵ The 25 franc per capita levy for breaking the resistance of the French was therefore a justifiable measure.⁶⁶

Finally, Leuder, Loening and the *Kriegsbrauch im Landkriege* defend the policy of pecuniary penalties as applied in 1870-71 on the ground that it was successful in deterring the civil population from persisting in their resistance to the authority of the enemy—a very doubtful justification, because if the test of the legitimacy of an instrument or a measure be merely its success few instrumentalities or methods would be unlawful. Strupp likewise defends the theory of collective responsibility in its extreme form. "The whole town," he says, "is guilty of the acts of every one of its inhabitants."⁶⁷ But Bluntschli,

⁶² Holtzendorff, *Handbuch des Völkerrechts*, Vol. IV, p. 508; see also sec. 112, note 14 (p. 473).

⁶³ Morgan, *The War Book of the German General Staff*, p. 178. Both Leuder and the general staff assert that the fines levied by the Germans were small in comparison with the contributions extorted by Napoleon. ⁶⁴ *Ibid.*, p. 509.

⁶⁵ *Ibid.*, p. 505. See Westlake's comment on this doctrine in his *Collected Papers*, p. 251.

⁶⁶ *Ibid.*, p. 510. Lammasch at the First Hague Conference likewise defended the theory that money contributions may be levied for the purpose of exercising pressure upon the inhabitants to sue for peace. Ferrand, *Des Réquisitions*, p. 229.

⁶⁷ *Das Internationale Landkriegsrecht* (1914), p. 248. Compare also the fol-

very properly, it would seem, limits the right of collective punishment to communes and individuals who facilitate the commission of crimes against the authority of the occupying belligerent, or who fail to prevent them when it is possible to do so.⁶⁸ Von Liszt also remarks that it is not permissible to impose collective punishments (except by way of reprisal) for individual acts unless the totality (*gesamtheit*) of the population is responsible.⁶⁹

Albert Zorn, another German writer, although defending in general the German measures of 1870-71 as "juristically correct and therefore unconditionally legal," nevertheless lays down the proposition that a community may not be punished for the act of an individual who injures a railway, a bridge or a telegraph line if it can prove that it has done all in its power to prevent the act.⁷⁰ Wehberg, to quote one more highly respected German authority, defends in general the principle of community responsibility, but he limits it to cases in which the inhabitants are actually responsible, even if only passively.⁷¹

The right of a military occupant to the unqualified obedience of the inhabitants over whom his authority has been effectively established is recognized by all writers on international law, and it is clearly affirmed by the Hague Convention respecting the laws and customs of war. The principle has also long been recognized, and it is affirmed inferentially by the above mentioned Hague Convention (Article 50), that he may hold the entire population responsible under certain con-

lowing remarks by Herr Walter Bloem in the *Kölnische Zeitung* of July 10, 1915: "The innocent must suffer with the guilty, or, if the latter cannot be discovered, the innocent must pay the penalty for the guilty, not because they have committed a crime, but to prevent the commission of crimes. The burning of a village, the execution of hostages, the decimation of the inhabitants of a commune who have taken up arms against the advancing troops, are less acts of vengeance than signs of warning to the parts of the territory not yet occupied."

⁶⁸ *Op. cit.*, sec. 643 bis.

⁶⁹ *Das Völkerrecht*, p. 340.

⁷⁰ *Das Kriegerrecht zu Land*, p. 242. Zorn, like Loening, apparently disapproves the punishment of communes other than those in which the offense was actually committed.

⁷¹ Capture in War (English translation by Robertson), p. 48. Meurer holds substantially the same opinion. A community, he says, cannot be punished for the act of individuals unless the entire population is responsible either in an active or passive sense. *Das Kriegerrecht der Zweiter Haager Konferenz*, p. 286.

ditions for acts committed against his authority⁷² by persons not belonging to the armed forces of the enemy and may punish the community by fines or otherwise for such acts. This right, however, is not unlimited. It is subject to certain well-recognized limitations and restrictions, and can not be exercised arbitrarily at the will of the commander. Article 50 of the Hague Convention declares that "no general penalty (*peine*), pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they can not be regarded as jointly and severally responsible" (*solidairement responsables*).⁷³ Unfortunately the convention does not undertake to define the elements of responsibility, and military commanders therefore are left to judge for themselves in each specific case whether the act is or is not one for which the community could be properly held responsible. But the determination of the question of responsibility is obviously governed by certain well-established principles, one of which, it would seem, is that the community is not really responsible unless the population as a whole is a party to the offense, either actively or passively. If the act has been committed by isolated individuals in remote parts of the community without the knowledge or approval of the public authorities, or of the population, and which therefore the authorities could not have prevented, it would seem unreasonable and contrary to one of the oldest rules of the criminal law to impute guilt or responsibility to the whole population.⁷⁴ Likewise, if the authorities have

⁷² There is a difference of opinion as to whether the right of punishment is limited to offenses in violation of the laws and customs of war. Bordwell (p. 316) thinks it is so limited, but Spaight (p. 408) holds otherwise and affirms that it extends to all acts forbidden by the occupying authorities, whether they are infractions of war law or not.

⁷³ The word *amende*, employed in the Brussels Declaration, was rejected by the Hague Conference for the term *peine*, on the ground that the use of the former term involved a confusion of ideas of the criminal law with those of international law. See Albert Zorn, *op. cit.*, p. 240, and Meurer, *op. cit.*, p. 287. The change, however, has been criticized by some writers because the word *amende*, it is said, has a clear and definite meaning in international law. Compare Pont, *Les Réquisitions*, p. 92, and Merignhac, *Les Lois et Coutumes de la Guerre sur Terre*, p. 290.

⁷⁴ Commenting on Article 50, Lawrence (Principles of International Law, p. 447) remarks that it allows inferentially pecuniary penalties upon communities when the responsibility can be brought home. "If a detachment occupying a village," he says, "were slaughtered in the night while asleep, few would argue that the com-

exercised reasonable diligence to prevent the act and if they have exerted themselves to discover and punish the actual perpetrators, it hardly seems reasonable or just to say that the community is really responsible. To so hold is to insist that the public authorities are obliged to guarantee the perfect enforcement of the law, something which no community has ever in fact been able to do.

Nys remarks that collective responsibility exists only when the offense is imputable to all the inhabitants, as in the case of public injuries to the occupying force, manifestations of revolt and the like, or when the population by its attitude and will opposes an investigation.⁷⁵ Nys even contends that community fines may not be justly levied for the acts of a few isolated individuals. Such fines, he says, may be imposed only where the whole population is guilty and this guilt must be proven by the military authorities. He repudiates Loening's view that no obligation rests upon the military authorities to establish the guilt of the inhabitants, and also the doctrine of Loening, Leuder and others that the effectiveness of pecuniary punishment in preventing a repetition of the acts is a sufficient justification for the resort to collective penalties.⁷⁶ The purpose of Article 50, as Spaight

munity had no collective responsibility if a conspiracy of silence should baffle all attempts to discover the real perpetrators. On the other hand, if a train were derailed in the night while passing through a wild ravine far from human habitation, it would be wrong to hold that the population for miles around could have known of the deed and have assisted in it directly or indirectly."

⁷⁵ *Le Droit International*, Vol. III, p. 429. Compare also Brenet, *La France et l'Allemagne devant le Droit International pendant leurs Operations de la Guerre 1870-71*, p. 197, and Westlake (*op. cit.*, Vol. II, p. 106), who remarks that no fine is justifiable except where the responsibility can "justly be imputed to the inhabitants." Compare also Rolin's report on the subject at the First Hague Conference, where it was said: "that strictly individual acts could never be followed by collective repression in the form of a special war levy, and it becomes necessary that any repression, directed against the community, should be founded upon the more or less passive responsibility of that community. . . . The rule holds good not only in respect of fines, but for all penalties, pecuniary or otherwise, which it may be proposed to inflict upon the population as a whole."

⁷⁶ See his article on *Contributions et Réquisitions* in the *Revue de Droit Int. et de Lég. Comp.*, Vol. 38 (1906), p. 430. Compare also Merignhac (*op. cit.*, p. 282), who contends that contributions under the form of fines can be levied only on offenders and their accomplices, and that they are illegal when they fall upon innocent persons, whatever the motive for which they are levied.

remarks, was to confine collective punishment to such offenses as the community has either committed or has allowed to be committed.⁷⁷ Bonfils interprets the meaning of the article in a similar sense. A fine, he says, must be in its *quantum* proportionate to the gravity of the offense; it must bear only upon the offender and his accomplices; it is iniquitous when it falls upon the innocent who were not able to foresee the act, nor to prevent it nor to discover the offender.⁷⁸

If, in the main, the principles thus laid down regarding the nature and limits of collective responsibility be admitted as sound, it is difficult to justify many of the impositions levied by German military commanders during the present war. Again and again they have imposed fines which would seem to be out of proportion to the gravity of the offenses alleged, and in some cases quite beyond the ability of the impoverished inhabitants to pay. It has been asserted that this was true of the levy of 60,000,000 francs on Liège (it matters little whether it was technically a contribution or a fine) — a sum which amounted to about 300 francs per capita of the population; of the levy of 50,000,000 francs on Craiova, a town of only 52,000 inhabitants; of the fine of 10,000,000 francs on Courtrai; of the 100,000 franc fine on Mons; of the fine of 3,000,000 francs on Tournai; of the fine of 3,000,000 francs on the village of Wavre; and various others. In a number of instances it must also be remembered that these impositions were in addition to other heavy exactions in the form of requisitions, contributions and tax levies. Sometimes the offenses alleged were inconsequential acts committed by isolated individuals and involving no military injury or evidence of organized hostility to the authority of the occupying forces. Some of them, indeed, were so obviously mere pretexts that the exactions imposed were, as has been said, nothing more than contributions under the guise of fines. Some writers hold, and very properly, that such impositions do not differ from pillage, except in name, and are therefore forbidden by international law.⁷⁹

⁷⁷ *Op. cit.*, p. 408.

⁷⁸ *Op. cit.*, sec. 1218. To the same effect see also Despagnet, *op. cit.*, secs. 587-588; Feraud-Giraud, *op. cit.*, p. 17, and Bordwell, *op. cit.*, p. 317, who remarks that collective punishment is permissible only when the community could and should have prevented the act.

⁷⁹ Compare Latifi, *Effects of War on Property*, p. 34, and Bluntschli, *Droit Int. Cod.*, sec. 654.

In other cases the fines imposed can be justified only on a theory of collective responsibility which is rejected by the great majority of writers and which hardly seems in accord with reason or justice. Such a case was the fine of 5,000,000 francs on Brussels for the act of a police constable. The affair was one of which the population had no knowledge; they were neither active nor passive accomplices; nor was the act one which the authorities could have prevented, because they could not have foreseen it. It was an isolated individual offense and the offender was promptly arrested by the German authorities and punished by a term of imprisonment. It is difficult to understand the process of reasoning by which responsibility for an act of this kind could be imputed to the whole population. The fine was therefore nothing more than a contribution in disguise and involved no question of community responsibility.

Likewise, it is difficult to justify the second fine of 5,000,000 francs imposed on Brussels for the destruction of a Zeppelin. If the act was committed by a person belonging to the Belgian military forces, it was a lawful belligerent act for which the community was not liable to punishment; if it was done by a civilian, responsibility could not be imputed to the whole population, unless it was established that they were accomplices, which was probably not the case. In any event, the amount of the fine in both cases would seem to have been out of proportion to the gravity of the offense. The legality of the third fine of 5,000,000 francs laid on Brussels in consequence of the popular demonstration on the national holiday has been denied by the Belgian writers on the ground that a military occupant has no lawful right to repress by huge fines the manifestation by the inhabitants of their patriotic sentiments. It can hardly be contended, however, that if acts of this kind amount in fact to open manifestations of hostility toward the occupying Power, or if they are accompanied by public disorders, they may not be repressed or punished by means of fines. On the other hand, if as the Belgians allege to have been true in this case, the demonstrations were peaceable, and consisted merely of processions and the carrying of flags and that no manifestations of hostility took place, the imposition of the fine is less defensible, if it can be defended at all. Certainly, the imposition of a heavy fine on the town of Lierre for the

hoisting of the Belgian flag on a tree, if as the Belgians allege, the act was unaccompanied by manifestations of hostility or the spirit of revolt, strikes one as being a species of petty tyranny of the same kind as the act of the Federal commander who at Natchez in 1864 banished a local preacher for refusing to pray for the President of the United States.⁸⁰ The same judgment may be passed upon the act of the German commander who fined the city of Lille for the demonstrations of sympathy by some of the inhabitants for their unhappy fellow countrymen who were being escorted as prisoners through the streets. No acts of hostility were charged, no disorders appear to have been committed and no injury was done to the authority of the occupying forces.

The 500,000 franc fine levied on Brussels in consequence of the crime of murder by an unknown person in the suburb of Schaerbeek — this on the assumption that the weapon used had been procured in Brussels where the possession of firearms by the inhabitants had been forbidden by the military authorities — certainly involved a wide extension of the theory of collective responsibility. The local civil authorities had issued a proclamation urging the people to bring in their firearms and deposit them at the city hall and warning them of the severe penalties to which they were liable in case of non-compliance with the orders of the military authorities. If the civil authorities did all in their power to insure compliance with the German military regulations and also exerted themselves to discover the offender, as they claim to have done, it may be seriously doubted whether under any reasonable or just interpretation of the rule as to collective responsibility either guilt or responsibility could be imputed to the whole population. In any case, one is tempted to inquire why the responsibility for enforcing the orders of a military occupant should be placed on the civil authorities. The Hague Convention in fact imposes upon the occupying authority the duty of maintaining order; his authority in the occupied district is supreme; he has full control of the local administrative and judicial machinery; he may alter the criminal law and increase its severity in order to repress acts against his authority; he may establish special tribunals to enforce the law; and he has at his disposal his own armed forces. In view of these facts, it is a fair question to

⁸⁰ As to the facts of this case see Garner, *Reconstruction in Mississippi*, p. 37.

raise whether he has any legal or moral right to shift the responsibility for the enforcement of his orders to the shoulders of the civil authorities and hold them responsible for infractions which neither he nor they can prevent.

The imposition by the German officers in numerous instances of fines for the acts of unknown individuals in cutting telegraph and telephone wires, for firing upon German troops, for committing injury to bridges and lines of communications, and for other similar acts, would seem to be defensible only on the assumption that the mass of the population were accomplices, or at least approved the acts, and that the civil authorities could have prevented them had they desired to do so—an assumption which in the majority of cases was probably unwarranted.

The fine levied on Malines for the neglect of the mayor to notify the military authorities of Cardinal Mercier's journey in violation of the traffic regulations, seems to have been based on a curious interpretation of the theory of collective responsibility, and it is difficult to understand the reasoning by which the responsibility for His Eminence's conduct was imputed to the entire population. If any one, other than the Cardinal himself, was responsible, it was the mayor, and it would seem that either he or the Cardinal and they alone were the proper persons to punish.

The same thing may be said of the punishment of various towns and cities for the refusal of the municipal authorities to furnish the Germans with the names of unemployed persons and with lists of the local railway employees. It was they and not the population who refused to comply with the orders of the occupying belligerent, and it would seem that they were the proper persons to punish. The imposition of collective fines in these and other similar cases cannot be justified on any reasonable theory of community responsibility; they were in fact nothing more than contributions levied under the pretext of punitive measures and for the enrichment of the military occupant. The fining of Epernay for the inability of the civil authorities to comply with the demand of the military authorities for a quantity of salted bacon, if the assertion of the civil authorities be true, that no such supplies were available in the town, was wholly indefensible; if the facts were otherwise, the punishment was of course a justifiable measure.

Both the Belgian and French authorities charge the Germans with imposing community fines in various instances for acts which were committed, not by the civil population, but by persons belonging to the regular armed forces and which were therefore legitimate acts of war for which the community was not liable to punishment. It is impossible to establish the truth of this charge, although there is good reason for believing that the Germans, as in 1870-71, went too far in treating injuries to their communications and other similar acts when done by detached bodies of troops as the acts of *francs-tireurs* and, therefore, not permissible by the laws of war. There can be little doubt that the German *franc-tireur* doctrine has been over-exploited and too often invoked as a justification for severities against the civil population for acts which were committed by persons belonging to the regularly organized armed forces.

On the whole, the evidence regarding German practice in respect to the imposition of pecuniary penalties on the civil population of occupied districts during the present war justifies the conclusion that their policy was based on a theory of collective responsibility which is neither in accord with the well established principles of modern criminal law nor with the interpretation of Article 50 of the Hague Convention which has been given it by the great majority of recent writers on international law, including even many of those of German nationality. Unfortunately, the theory of collective responsibility, even when applied in its mildest form, necessarily involves the punishment of innocent persons, and for this reason it ought never be resorted to when other more just measures would accomplish the same end, and in no case unless an active or passive responsibility can really be imputed to the mass of the population, or where the civil authorities have failed to exercise reasonable diligence to prevent infractions or to discover and punish the actual offender in case they have been unable to prevent the offenses. Some writers hold that collective punishments ought never be resorted to except as a measure of reprisal, while others, like Bonfils and G. F. de Martens, condemn the whole theory and express the hope that it will ultimately disappear entirely from warfare.⁸¹

⁸¹ Bonfils, *Droit Int., pub. sec.* 1224, and G. F. de Martens, *Traité de Droit Int.*, Vol. III, p. 265. Compare also Rouard de Card, p. 178.

As the Germans have learned, however, it is a measure which is both easy of enforcement and is generally effective in deterring the civil population from committing infractions against the authority of the occupying forces, and these circumstances have accentuated the temptation to abuse the right and to extend it to cases to which it can not be applied, except upon an interpretation which can hardly be reconciled with reason or the generally recognized principles of criminal justice. It was just because of its effectiveness that Leuder, Loening and other German writers have sought to justify the wide extension of the theory and its use on a large scale in the war of 1870-71. There is no difficulty in justifying such a policy, if one only accepts the German doctrine that the test of the legitimacy of an instrument or a measure is its effectiveness, that is, whether its employment contributes to the attainment of the object of the war.⁸²

However strongly we may condemn the general policy of the Germans in respect to the imposition of collective penalties during the present war, it would be going too far to assert that the conduct of the civil population of the districts occupied by the German forces was always irreproachable. It is difficult for an American on the basis of the information now available to reach a definite conclusion as to the truth or falsity of the various charges and countercharges, but it is fair to assume that in some instances the imposition of fines was not

⁸² See, for example, the *Kriegsbrauch im Landkriege* (trans. by Morgan), pp. 69, 84, 85; Leuder in Holtzendorff, Vol. IV, sec. 96; Von Hartmann, *Militärische Nothwendigkeit und Humanität* in the *Deutsche Rundschau*, Vol. XIII, pp. 119 ff. and Vol. XIV, pp. 117 ff. and von Clausewitz on War (Eng. trans. by Graham, Ch. II). See also the views of Field Marshal Prince Schwarzenberg quoted in the *Continental Times* of September 17, 1915. There is little German literature dealing with the levying of collective penalties during the present war which is yet available in America. Meurer's monograph entitled *Die völkerrechtliche Stellung der vom Feind besetzten Gebiete* (1915) contains a brief general defense of the German policy, and Albert Zorn in his *Kriegsrecht zu Land* (1915) apparently finds nothing for which the Germans may justly be reproached. It is a little singular that the German White Book, the *Belgian Peoples' War*, which contains an elaborate defense of many of the charges that have been made against the Germans in Belgium, gives no attention to the subject of contributions, requisitions or fines. Likewise Stier-Somlo, in a long article dealing with international law in the territories occupied by the German forces (*Zeitschrift für Völkerrecht*, Vol. VIII (1914), pp. 581-608, ignores the Belgian charges that the Germans were guilty of a policy of wholesale spoliation under the form of contributions, requisitions, and collective fines.

unjustified, if we accept the theory of collective responsibility in any form. Nevertheless, it may be said, by way of extenuation of the conduct of the Belgians, where they were really guilty of committing offenses against the authority of the occupying forces, that the provocation under which they acted was extremely great. They were the innocent victims of an unjust invasion; they were expected to remain silent spectators while their land was ravaged and their countrymen put to death in large numbers without cause, as they believed; to all this and more they were required to submit absolutely under the severest penalties. That they should have at times overstepped the hard limits which were thus set to their conduct by a ruthless military conqueror is to have been expected. These extenuating circumstances the Germans might well have taken into account, and where real military necessity required the infliction of punishment in the form of pecuniary exactions, more regard might have been had to the impoverished condition of the inhabitants and their inability to raise exorbitant sums of money. Measures of such severity as those to which the Germans had recourse in many instances are always of doubtful expediency in the end, because instead of subserving a real military necessity they only tend to drive the population to desperation, to arouse an undying hatred against the occupying belligerent, to intensify the spirit of revenge, and finally to make it more difficult to overcome effectively the resistance of the people who are made the victims of such severities.

JAMES W. GARNER.

TREATY VIOLATION AND DEFECTIVE DRAFTING

A TREATY, by whatever technical name it may be known, is a solemn undertaking in derogation of the sovereignty of the state, which is entered into for the purpose of establishing, regulating, or destroying a juridical contract binding two or more states. It ordinarily establishes the definition of a specific jural relation actually subsisting between the contractants, who engage to accept and enforce it as positive law;¹ but not infrequently establishes new relations. Accord-

¹ A treaty is primarily a compact between independent nations, and has been briefly described as a contract between nations. 38 Cyc., 961.

A compact between states or organized communities or their representatives. *United States v. Hunter*, 21 Fed. 615, 616.

Treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization. Mr. Justice Brown in *Tucker v. Alexandroff*, 1901, 183 U. S., 424, 427, cited in *Scott's Cases on International Law*, 426.

As between nations it [a treaty] is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party the other may, at its option, declare it terminated. Davis, J., in *Hooper*, Admr. v. *United States* and other cases, 1887, 22 Court of Claims, 408, 416.

Treaties are not purely voluntary compromises; they are acknowledgments of material conditions engendered by the state of society. Those which have anticipated most have been doomed to the most humiliating failures. David Jayne Hill, *History of European Diplomacy*, II, 605.

Their general character must assimilate them to a real contract. They may be defined as the expressly declared agreement by two or more states to establish, modify or extend between them an obligatory relation. Despagnet, *Cours de Droit international*, sec. 444.

Hautefeuille (*Des droits et des devoirs de nations neutres*, I, 10) observes that treaties which limit themselves to appealing to the provisions of primitive laws and to determining and regulating the method of their exercise between the contracting parties are always obligatory, not only for the whole time stipulated by the parties, but for the whole period of existence of the contracting states, because they cannot modify the rules relative to the execution of the primitive laws.

A treaty is a contract between independent political societies. . . . A contract is an accepted promise. . . . An obligation is a force determining human conduct. The force exerted by the penalty attached to the breach of law, and thus by the law itself, is the thing corresponding to the phrase *legal obligation*. The force

ing to strict theory, each sovereign state is entirely at liberty to do anything it pleases, but, as in the case of the individual, the history of civilization is the history of states exercising their sovereignty to derogate therefrom so that mutual relations may be rendered more satisfactory. A treaty is, of course, valid only if contracted voluntarily; but though in the past duress has been exerted to force signing a treaty, in modern practice, ratification, an executive function, is a condition precedent to binding force, and, as a consequence, any ratified treaty may be considered as valid.

In view of the volition exercised in negotiation and the second thought provided by ratification, what is the status of the violation of a treaty? It can be defined only as an illegal phenomenon. And this is the more true because the inherent sanctity of treaties is even greater than that of the municipal law, which in many cases is repugnant to the interests of the individual citizen who is bound by it, while a treaty is always the consensus of the negotiating states. Consequently, international law has developed many tests for determining the legality of treaties. Rules of mere interpretation are not much different from those of municipal law; but we are concerned here rather with means of determining when a treaty ceases to exist. The very best method of determining this is by inserting a periodic clause in the treaty itself,

exerted by the sentiment of moral disapproval, and thus by any rule of conduct to the infraction of which it is attached, is the thing answering to the phrase *moral obligation*. But this is not precisely what we mean when we use these phrases. We do not mean the force actually exerted in either case — a force which varies infinitely. . . . We mean rather the force which the law is calculated to exert — without any conscious analysis of the notion expressed by "ought," which indeed seems to elude analysis. The obligation of a law thus denotes to us, not the actual force of the law, but a force which our minds ascribe to it; and the obligation of a moral rule denotes a force which our minds ascribe to the moral rule. The moral obligation of a contract is the duty of not disappointing the expectation which the promise is calculated to create; and the strength of the duty depends on the strength and the reasonableness of that expectation. The rules of conduct which use and opinion are sure to beget by degrees among civilized communities in constant and various association with each other have acquired not only the name but somewhat of the strength of laws; they perform for nations, though imperfectly, the precious service which laws perform for private men, that of furnishing fixed positive standards for conduct and for the adjustment of disputes. Mountague Bernard, *Four Lectures on Subjects connected with Diplomacy*, 164-169.

stating that the document shall remain in force for a stipulated period from the date of exchange of ratifications. Such a clause is found in nine-tenths of the treaties—practically all nonpolitical treaties—negotiated in recent years and operates automatically to bring the documents up for review. Earlier treaties, however, did not contain this provision, and it is not considered desirable in treaties of neutralization; or necessary in other acts where execution of the contract is accomplished once for all, such as a cession of territory, or in conventions that are declarative of accepted law, such as the Hague engagements.

This study is to be mainly historical as to the violation of treaties in the strict sense, and it is, therefore, important to get bearings at the outset. A treaty is not violated by a difference of agreement as to its meaning; it can only be violated when the parties accept the same meaning and the sense thereof is contravened. A treaty can be violated by extinguishing it without proper reason, and this is the most customary method that history divulges. State A declares that for it a treaty does not exist or bind, and the failure on the part of B to accept this point of view will constitute violation by A. But, as extinction of treaties is a normal phenomenon, it is necessary to show the methods by which this can be accomplished. For the purpose of making the requisite distinctions, I have taken four lists, compiled respectively by Wharton, Bluntschli, Laghi, and Bonfils-Fauchille,² of

² Wharton, *International Law Digest*, 2, 58, cited Moore, *Digest of International Law*, 5, 319; Bluntschli, *Das moderne Völkerrecht*, secs. 411, 412, 414, 450 ff.; Laghi *Teoria dei trattati internazionali*, 198 ff.; Henry Bonfils (mise au courant par Paul Fauchille), *Manuel de Droit international public*, 855-860.

It should be stated that nothing new has been added to the framework of law relative to the extinction of treaties since Samuel Puffendorf wrote Book III of *Juris naturae et gentium libri VIII* in 1672, and he was much indebted to Grotius. Almost all authors of treatises refer to the subject, many as fully as those here cited.

For a study of extinction see Olivi, Luigi, *Sull' Estinzione dei Trattati internazionali*, in *Annuario delle Scienze giuridiche, sociali e politiche, diretto da Carlo F. Ferraris*, Anno 4, 1883, 1-67. Olivi reviews the opinions of publicists very thoroughly and concludes *inter alia*:

"Therefore, with few exceptions, we can say that our science was and is unanimous in protesting against the violation of international pacts, and that just as it has recognized the freedom of states to bind themselves by valid agreements, so it has denied to them an unlimited freedom of choice in considering them extinct at their pleasure, taking merely material interests as the only rule for such behavior" (p. 11).

the methods by which treaties attain the end of their life. Each is written from a somewhat different point of view, and they repeat each other to a very small extent, even when discussing the same general cause of the extinction of a treaty.

Wharton considers the circumstances under which treaties may be modified or abrogated, and his attitude evidently is that, with these circumstances present, the document is practically automatically altered or extinguished. Bluntschli considered both voidability and extinction. Laghi takes up primarily the treaty which in its nature is impossible. Bonfils-Fauchille lists "the causes which bring about the extinction of conventional obligations." If we were confined to a single plan, the last one would be chosen for this study, but all the lists have been combined and supplemented. The methods, then, by which a treaty comes to an end are as follows:

1. The full and complete execution of the treaty (Bonfils-Fauchille [A]) which occurs (a) when all material stipulations have been performed, or (b) when the acts accomplished are done once for all (Wharton, 4), and do not set up permanent conditions (Dalloz, *Répertoire*, 42, Part I, 561, sec. 167; Puffendorf, I, XVI, 1).

2. The expiration of the conventional term (Bonfils-Fauchille [B]; Dalloz, sec. 167, 2; Bluntschli, 450, c; Puffendorf, I, XVI, 7).

3. The attainment of a cancellative condition expressly provided for (Bonfils-Fauchille [C]; Dalloz, sec. 167, 2), which from another point of view may be stated as the ceasing to exist of a state of things which was the basis of the treaty and one of its tacit conditions (Wharton, 7; Hall, 293, 5; Bluntschli, 450, b).

4. Impossibility of execution. Wharton considers abrogation proper in the case of moral or physical impossibility; Bonfils-Fauchille definitely excludes physical impossibility from consideration (*cf.* Hall, 293, 4). The following theoretical cases of impossible treaties, chiefly from Laghi's list, may be instanced:

"In harmony with the argument previously maintained, we dub as unacceptable the theory of Del Bon, which makes the subsistence or extinction of a treaty of commerce depend on the mere utility of a contracting state" (p. 30).

"Different criteria according to the various kinds of treaties cannot be adduced, but it is necessary to fix in some way a single criterion for all cases" (p. 31).

- (a) Those which are juridically impossible; where execution in regard to one contractant would specifically violate the document in respect to another contracting State.³ Such a situation might now arise if two Powers were given conflicting rights in the same territory, particularly if the subject of the treaty were ordered therein to take action to satisfy both.
- (b) Those which fail to recognize or offend the principle of nationality (Hall, 293, 6).
- (c) Those which establish cessions, donations, changes, separations, unions, or federations of people without the consent of those interested.
- (d) Those which contract for the assistance of foreign troops against their own subjects, or for intervention or protection when the people protected are deprived of their inherent liberties.
- (e) Those which sanction conquest, the abdication of sovereignty, the subjection of one people to another; phrased by Bluntschli as those which "aim at the forcible suppression of a peaceful and virile state" (sec. 412, b).
- (f) Those which impose on a state a given form of government, a dynasty, a limit to its free political, economic, or intellectual development.
- (g) Those which deal with affairs of states not parties to the treaty, or contradict valid and nonextinct treaties with other parties of earlier date (in so far as they contravene the other treaties) (Hall, 275).
- (h) Those which deal with things common to all, as seas, or deny any right to foreigners, or prescribe religious persecution.
- (i) Those which contract dishonest loans or offend the general laws of humanity and the necessary principles of the law of nations.
- (j) Those which recognize slavery, piracy, brigandage, etc.
- (k) Those which prevent a state from excluding foreigners from its territory in the public interest.⁴

³ Vattel (III, VI, 93) poses the proposition in considering three allied states, of which two are at war against each other and are calling on the third for assistance.

⁴ An arbitrary expulsion may nevertheless give rise to a diplomatic claim. Moore,

5. The renunciation by a state of the rights which a treaty confers upon it (Bonfils-Fauchille [E]); otherwise stated as the election to withdraw of a party having the option (Wharton, 5; Hall, 293, 2; Dalloz, sec. 167, 3; Puffendorf, I, XVI, 3).

6. Mutual consent to bring the agreement to an end (Wharton, 1; Hall, 293, 1). This seems a better phrasing of the idea than the "mutual dissent" of Bonfils-Fauchille [F], which is explained as the "concurrence of the wills which sufficed to create rights and obligations between states." (Puffendorf, I, XVI, 4.) Bluntschli defines it as extinction "through a free agreement" (sec. 452).

7. Denunciation under conditions provided in the treaty itself (Bonfils-Fauchille [G]; Hall, 293, 3).

8. When continuance is conditioned upon terms which no longer exist (Wharton, 2; Dalloz, sec. 167, 5), provided annihilation has not been occasioned by the fault of the parties, by the decease of the person interested or obliged, if no one else legally succeeds (Heffter sec. 99; Puffendorf, I, XVI, 6).

9. Unilateral denunciation⁶ (Bonfils-Fauchille [H]) in accordance with the maxim *conventio omnis intelligitur rebus sic stantibus* (Wharton).

10. The refusal by either party to perform a material stipulation (Wharton, 3; Bonfils-Fauchille [I]).

11. Extinction, temporary at least, by war of treaties, incapable of execution during hostilities (Bonfils-Fauchille [J]). In case of war only those treaties necessarily affected by the conditions are suspended

Digest of International Law, IV, 67-96. Allegations of treaty violation as a result of expulsion have been nulled by the United States in connection with incidents based on Art. 1 of the treaty of December 18, 1832, with Russia (*ibid.*, pp. 70-80, 111-129); Art. XIII of the treaty of June 13, 1839, with Ecuador (*ibid.*, p. 74); Art. 14 of the treaty of April 5, 1831, with Mexico (*ibid.* pp. 75-76); Art. 6 of the treaty of November 3, 1864, with Haiti (*ibid.*, pp. 89-92), though in this case (Loewi's) arbitrary circumstances complicated the question; Art. XII of the treaty of March 3, 1849, with Guatemala (*ibid.*, pp. 102-108).

⁶ Despagnet amplifies this and considers it legitimate (a) when observance of the treaty has become compromising for the political or economic existence of a country; (b) when the circumstances which were the motive for the treaty have changed and divest the clear purpose of the agreement of its reason for being. "But the condition of maintenance of treaties *rebus sic stantibus* must be in good faith and must not be extended to accidental modifications."

(see Wilson, Handbook, 209-212, 252). Lawrence, synthesizing Hall, analyzes the effect of war on treaties as follows (sec. 166-168):

(1) Multipartite treaties;

A. Great international treaties;

(a) Unaffected when war is unconnected with them.

(b) Unaffected as regards other stipulations and neutral signatories when the war does not arise out of the treaty but prevents performance of some provisions by belligerents.

(c) Effect doubtful, but dependent chiefly on will of neutral signatories, when the war arises out of the treaty.

B. Ordinary international treaties. Affected according to subject-matter, but generally suspended or abrogated with regard to belligerents and unaffected with regard to third parties.

(2) Bipartite treaties between belligerents.

A. "Transitory pacts" fulfilled by one act or series of acts and which produce a permanent effect are unaffected. (Cf. treaties of cession, delimitation, boundaries, etc., Bonfils-Fauchille and Lawrence; see Wilson, Handbook, 211.)

B. Treaties of alliance (Lawrence), peace, amity, commerce, etc. (Wilson, 252), are abrogated or come to an end.

C. Treaties for regulating ordinary social and commercial intercourse, such as postal and commercial treaties, conventions about property, etc., are doubtful as to the effect of war. If the treaty of peace does not deal with them, it is best to take them as merely suspended during war.

D. Treaties regulating the conduct of the signatories as belligerents, or as belligerent and neutral, are brought into operation by war.

12. The disappearance of the state by dismemberment; loss of part of a state's territory or the erection of new sovereignties on the

old territory, in which case treaties with a local application are naturally enforceable on the new sovereign.

13. Violation, by which is understood wilful disregard of treaty engagements, itself frequently in these days encouraged by conflict with municipal law or governmental policy.

Imperfect as this analysis doubtless is, one can readily see that a clear distinction must be drawn between the extinction of a treaty and its actual violation. Of the thirteen methods of extinguishing treaties listed above, Nos. 1, 2, 3, 5, 6, 7, 11, and 12 are normal processes of elimination, except that No. 11, extinction by war, is derived from an abnormal status and creates customarily only a temporary conventional death. No. 4, impossibility of execution, involves an antijural condition which is quite as much prohibition to negotiate on the lines indicated therein as it is a justification for extinguishing the agreement. No. 9, unilateral denunciation, is an abrupt, though not an illegal, method of extinguishing a treaty, as is familiar in the American action in thus abrogating the Treaty of 1832 with Russia. No. 8, in which continued existence is dependent upon conditions which no longer exist, by equity should clearly entitle the complaining party to relief, and, duly proved, should palliate an antecedent violation. No. 10, involving a refusal to perform a conventional stipulation, will serve to extinguish through subsequent negotiation; the method by definition contemplating the refusal as made dogmatically, anterior to adverse action. These explanations indicate, therefore, that out of thirteen methods of treaty extinction, at least eight are normal, and four will virtually accomplish violent extinction without the opprobrium attaching to actual violation. As Vattel says, "he who does not observe a treaty is assuredly perfidious, since he violates faith"; but he who takes proper measures to absolve himself from his promise for the future preserves his faith.

Historically, treaties were originally of little consequence if they were inconvenient, and yet the most elaborate methods were used to maintain them. The Greeks made use of the oath and religious ceremonies to render treaties binding, and there were other formalities, such as inscribing legends of faithfulness on money, exchanges of letters between the contractants, official declarations, and the *panegyreis*

which from a festival assembly eventually took on political attributes on occasion. The Fecial College of Rome had charge of treaties and, though the Greeks apparently were scrupulous about observing international engagements and for that reason made them for a term only, the Romans were exceedingly practical about such things. For instance, they set up a temple to the gods of the Assyrians, and if they wanted to avoid obligations toward a nation they put statues of that nation's gods in this temple, where in the theology of the day they became prisoners of the gods of Nineveh. Whereupon the Romans felt free from their vengeance and considered themselves at liberty to commit what evil deeds they liked. Theologically, the gods of the wronged nation had deserted it; and a nation without divine protection is beyond the pale. Romans always worked technicalities to their own advantage, and the violation of the sponsion of the Caudine Forks is both famous and typical. The Consuls T. Veturius Calvinus and Spurius Postumus were caught with the Roman army in the defile of that name without hope of escape. They made an onerous sponsion with the Samnite enemy, this being distinguished from a treaty (*foedus*) by its being signed without the fecial ceremonies consecrated by custom. The Samnite general accepted the word of the consuls and the chief officers, taking 600 hostages, depriving the army of its weapons and passing it under the yoke. The Senate refused to receive the consuls and thereafter considered itself free from the obligations imposed. The makers of the sponsion were delivered up to the Samnite leader, who refrained from revenging himself on the hostages. Historians unite in condemning the Roman practice, but it is well to realize that the engagement had only been signed, not ratified, even though under the circumstances the Roman honor most decidedly was bound. Grotius⁶ thinks that Rome was not bound, and Puffendorf⁷ believes that, as the sponsion was circumstantially fair, it should have had more consideration.

Reverting from the prenatal days of international law to the period of its conception, we find the Middle Ages cluttered up with a complicated treaty machinery. There were personal⁸ and state treaties;

⁶ *De Jure belli ac pacis*, II, XV, 16. ⁷ *Juris naturae et gentium*, VIII, IX, 12.

⁸ The last personal treaty that has come to the writer's attention is one be-

treaties between equals and unequals; alliances and simple treaties; conventions transitory and treaties perpetual, the "transitory" pacts setting up a permanent regime and the perpetual dealing with recurring situations. More types could be mentioned, but the significant thing is that different rules applied to different types. The oath was the sanction of the period, supposedly with all the ecclesiastical force of the Roman Church behind it. "History shows," says Calvo,⁹ "that, even in the time when it was customary, the oath did not always have a strictly obligatory and ineffaceable force, since frequently Catholic princes were absolved by popes from engagements to which it was applied. This notably occurred to Ferdinand of Aragon with Pope Julius II; to Francis I with Leo X and Clement VII; to Henry II with the apostolic legate Caraffa (Paul IV)" as to the truce of Vaucelles (1556). The kings of the Middle Ages were thus able to go around inconvenient treaties by an appeal to, or arrangement with, the highest ecclesiastical authorities. Pope John XXII declared the joint oath of the Emperor Louis of Bavaria and Frederick of Austria null when the former freed him. Philip, duke of Bourgogne, was absolved from an alliance with the English by Pope Eugenius IV and the Council of Basel (1431), and the same pope absolved Ladislas VI of Poland from his oath. The Peace of Westphalia displeased Pope Innocent X, who published a bull in which "from his certain knowledge and full ecclesiastical power" he declared certain articles "null, vain, invalid, unjust, condemned, reprovèd, frivolous, without force and effect, which no one is bound to observe in any respect even though they are fortified by oath. . . . And nevertheless, as a still greater precaution and so far as necessary, from similar movements, knowledge, deliberations and plenitude of power, we condemn, reprove, dissolve, annul, and deprive of all force and effect the said articles and all other provisions prejudicial to the above."¹⁰

tween Queen Victoria and the King of Prussia for the marriage of the Princess Royal with Prince Frederick William Nicholas Charles of Prussia, signed at London, Dec. 18, 1857 (Parl. Papers, 1857-58, LX, 1).

⁹ Charles Calvo, *Le Droit international*, ed. of 1870, I, 719-720.

¹⁰ Père Bougeant, *Histoire du traité de Westphalie*, VI, 413, 414. The oath is to be found in most old treaties. Compare those of Cambrai (1529), Art. 46; of Cateau Cambrésis (1559), Art. 124; of the Peace of the Pyrenees (1659), Art. 124; the

The oath itself consequently required bolstering up. The reinsurance consisted of another oath,¹¹ taken as to a clause incorporated in a treaty, that no attempt would be made at securing absolution from the main treaty; and then that no attempt would be made to circumvent the engagement through a third party.¹² The lapse of all such sanctions seems to have been due to inefficacy.

It is the period since the Peace of Westphalia in 1648 that really concerns the student of treaty violation. And for his purpose that period may be subdivided into the two centuries from 1648 to 1848, at which time democracy as distinguished from monarchy can be said to have established itself; and from 1848 on to the present. The first division saw an ever widening struggle against a political system inherited from the older regime based on the Roman theory of world domination. The second division, in which its thesis is still incompletely

Treaty of Ryswick (1697), Art. 38. The most modern example is in the alliance of 1777 between France and Switzerland, the oath being confirmed in the Cathedral of Soleure.

The oath was, of course, dependent for its efficacy upon the predominance of the Roman Church. So long as the Holy See was able to maintain a position for itself above all sovereigns, its influence was extensive in foreign relations between them. Pope Boniface "excommunicated Philip of France; absolved all his subjects from their allegiance to him; threatened them with curses if they obeyed him; declared him incapable of command; annulled all treaties which he might have made with princes." Robert Ward, *Enquiry into the Foundation and History of the Law of Nations in Europe*, II, 62.

"Another considerable advantage derived to sovereigns from the Pope's power appears in the manner in which the observation of treaties during these times was enforced. As the obedience of men gave the most effectual support to the decrees of the pontiff, it became common with them, when they entered into engagements, to subject themselves to the penalties of an interdict in case of failure, by which the power of the prince was blasted in its vigor; and could the frailty of mankind have insured a proper use of this prerogative, it would have continued one of the most powerful guaranties for the preservation of good faith that has ever been devised." Ward, *ibid.*, II, 32.

¹¹ An instance is the Treaty of Vincennes of 1371 between Charles V of France and Robert Stuart, King of Scotland, in which it was agreed that "the pope would discharge the Scots from all oaths they had taken in swearing the truce with the English, and that he would promise never to discharge the French and the Scotch from the oaths they had made in swearing the new treaty."

¹² Phillimore, *Commentaries upon International Law*, II, 81, lists the methods as oaths, hostages, pledges, guaranties, offering persons as sureties, and choosing third parties as guardians.

functioning, has seen an increasing struggle against a political system revolving around the person of the monarch, or a state ego. To the residuum of the past in any given present may usually be traced the provocation of treaty violation, though the technique of treaties is so imperfect that it has frequently been more satisfactory to lose the engagement as a corpse than to possess it as a living entity. "The reiterated confirmations of the Treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between the same parties, constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European states was permanently settled, until violently disturbed by the partition of Poland and the wars of the French revolution."¹³

The current problems of international politics have been based in large part on the Treaty of Vienna of 1815 which, after the Napoleonic period of European political earthquakes, offered an opportunity for the larger development of the thesis of nationality athwart the Westphalian influence of sovereignty in the state. As the earlier "Constitution of Europe" served, along with many elements of stability, to maintain a system of minor states and principalities in the face of a growing instinct of nationality, so the principles of legitimacy and balance of power underlying the Treaty of Vienna persisted in dominating Europe, until the one has been offset by democracy and the other has come into sharp contact with the controlling thesis of internationality, resulting from modern methods of life and demands on the world in which we live. These larger conflicts have made for instability in the course of time, and can and should be avoided by the simple resort to periodicity in the fundamental treaties, thus throwing the documents up for normal review at stated intervals. In all lesser treaties this is a confirmed practice.

In the days dominated by the Westphalian thesis, kings negotiated for their states in a personal capacity; nowadays the state is not the king, but the people, and it is no paradox that national morals are consistently higher than the individual's. The popular state's word needs no oath to back it. The same history applies to other methods of

¹³ Wheaton, *Elements of International Law*, Part III, cap. II, 11. The confirmations were due to an attempt to live up to the joint guaranty included in the treaty.

treaty sanction, the pledge, the hypothecation, the hostage, and the caution, which latter involved introducing a third party to look after fulfilment of the engagement. In fact, one of the very earliest of representative assemblies, the States General, on March 16, 1726 (O.S.), in response to a memoir of the Marquis de Saint Philippe, the Spanish Ambassador, passed this resolution: "From the observation and execution of treaties depends all the surety princes and states possess in regard to each other; and conventions to be made cannot be counted on if those which are made are not maintained."¹⁴ In the present, due attention to drafting and the all-important fact that a treaty represents the free consensus of the negotiating minds renders it absolutely inexcusable in law or morals that a treaty should be violated.

Violation of a treaty may be viewed from various standpoints. As a matter of morals, a distinction between deliberate and unintentional, or un contemplated, violation may be made; in which regard it may be said that deliberate infraction is now a rare phenomenon. As to character, violation may involve infraction of a part or a whole of the contract, the Grotian dictum here applying, that the articles of a treaty are conditions the lack of which renders it null. Violation may be express or implied, by which it is desired to distinguish between a definite or an indefinite conflict of the contract with action adverse to it. And violation may be internal or external as to the violating state.

Infraction of a whole treaty is almost impossible in modern times, for such engagements are invariably complex, and violation will customarily apply to a specific clause or article. Violation of a portion of a treaty will raise a definite cause of dispute, and in modern practice redress can usually be had through arbitration or claim proceedings. Not counting 127 general treaties of arbitration providing, among others, for reference of disputes relative to the "interpretation or application of treaties," there were 145 treaties in force in 1913 containing an arbitral clause relating to their content. As all of these treaties are bipartite at least, it can be seen that they practically exclude the temptation of infraction in the case of their contractants.¹⁵

¹⁴ Cited in Vattel, *Le Droit des gens*, II, XV, 221.

¹⁵ The figures are taken from Lange, *l'Arbitrage obligatoire entre nations en 1913*. It is interesting to note that this provision is of long standing, fitfully employed

These clauses apply to the bulk of the treaties in force, estimated to number 10,000. Of some 650 treaties of the United States, practically all are covered by this method. The provision is, however, generally excluded from political treaties.

Until Germany frankly advertised her violation of Belgium's and Luxemburg's neutrality conventions and Chancellor Bethmann-Hollweg brought forward the "scrap of paper" theory of international conduct, violation of treaties could almost be said always to have occurred by implication. A disposition to overlook an obscure provision that stood in the way, or to perform an act and leave it to the injured party to call attention to the violation involved, are subterfuges, even if intentional, that naturally would appeal to states at once jealous of their good name and mindful of world opinion.

Viewed from the state's coign of vantage, violation may be internal or external. Internal violation occurs when the state passes a law or commits an act within its borders contrary to a treaty. Turkey's recent abrogation of capitulatory privileges is an illustration that will constitute violation, if it can be maintained.¹⁶ No better example of external violation can be had than Germany's disregard of Belgium's neutralization.

As to the effect of treaty violation, Woolsey (sec. 112) says:

Treaties, like other contracts, are violated when one party neglects or refuses to do that which moved the other party to engage in the transaction. It is not every petty failure or delay to fulfill a treaty which can authorize the other party to regard it as broken, — above all, if the intention to observe it remains. When a treaty is violated by one party in one or more of its articles, the other can regard it as broken and demand redress, or can still require its observance.

until within recent years. The Treaty of Westphalia of 1648 provides for it in Art. 17, sec. 5; the Treaty of Oliva of May 3, 1660, in Art. 35, sec. 2; the treaty of 1756 between Denmark and Genoa; the treaty of 1843 between France and Ecuador; and the Treaty of Paris of 1856 in Art. 8.

¹⁶ Capitulatory provisions are (or were) in force with the Ottoman Empire as follows: France, 1604; England (Great Britain), 1675; Russia, 1783; Austria (Hungary), 1784; Two Sicilies (Italy), 1740; Spain, 1732; the Netherlands, 1680; Prussia (Germany), 1790; United States, 1830. Parenthesized names indicate territorial changes. Austria-Hungary and Italy are under contract with the Sublime Porte to support any attempt to abolish capitulations by negotiation.

Dalloz¹⁷ asserts that violation by one of the contractants evidently carries the right for the other to break it likewise, and Mr. Justice Blatchford, citing 1 Kent's Commentaries, 174, said:

Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture.¹⁸

Article 35 of the treaty between New Granada (Colombia) and the United States of December 12, 1846, of peace, amity, commerce, and navigation reads in part:

4. If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation.

5. If, unfortunately, any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right.

6. Any special or remarkable advantages that one or the other power may enjoy, from the foregoing stipulation, are and ought to be always understood in virtue and as in compensation of the obligations they have just contracted, and which have been specified in the first number of this article.

Provisions in force of identic tenor are in the treaties on the same subjects with Brazil, of December 12, 1828 (Article 33, 2, 3); with Morocco of September 16, 1836 (Article XXIV); with Bolivia of May 13, 1858 (Article 36, 2, 3). The treaty with Mexico of April 5, 1831, contained a similar set of provisions, but this portion of the treaty was

¹⁷ *Répertoire*, 42, part 1, 561, sec. 169. In the same general connection see also Rudolph von Jhering, *Der Zweck im Recht*, I, 474-500.

¹⁸ *In re Thomas*, 12 Blatch, 370, cited in Scott's Cases on International Law, 441; *Terlinden v. Ames*, 184 U. S. 270.

terminated by notice on November 30, 1881; as also that with Peru-Bolivia of November 30, 1836 (Article XXX, 2, 3), terminated by the dissolution of the Peru-Bolivian Confederation in 1839; and that with Peru of July 26, 1851 (Article XI, 2, 3), terminated by notice on December 9, 1863.

It may be set down as a general rule regarding the effect of violation, that it shall always have a minimum effect. For breach of contract is necessarily against public order and the burden of proof is against it. So that three dicta may be propounded:

1. The breach of the principal articles involves that of accessory ones, only if these cannot stand alone.

2. Breach of accessory articles does not involve or justify breach of articles from which they depend. For instance, the principal articles of a treaty stipulate that a boundary shall be determined by states A and B. The boundary is determined. An accessory article provides that it shall be marked by stone posts throughout. A erects iron posts, which violation will not change the effect of the other boundary articles.

3. The violation of a treaty does not annul other subsisting treaties providing they are not simple accessories of the broken contract.

Reverting to instances of violation ¹⁹ it is the intention to cite cases in accordance with the distinctions set forth above, but it seems advis-

¹⁹ Instances of vigorous treaties only have been examined. It may be useful to submit tests to determine them. F. de Martens, in his *Traité de Droit international* (I, 515) lays down certain fundamental conditions which must underlie a treaty. He divides these into: (1) subjective conditions, as to the persons who conclude the acts; and (2) objective conditions, as to the objects of the treaties. The subjective conditions are: (1) The concluding states must be fully independent, semi-sovereign states not having the legal capacity to sign treaties (*Staatsarchiv*, XXIX, No. 5482); (2) negotiators must have full powers to engage a state and observe the customary forms of this state; (3) the necessity of sanctioning or ratifying, ratifications indicating the formal acceptance by the sovereign authority of a treaty concluded by duly authorized plenipotentiaries; (4) free will of the contracting parties, error, fraud and constraint rendering an international agreement without effect; (5) reciprocity of declarations, it being necessary that every proposition made by one of the parties be accepted by the other. (In this connection the learned Russian cites an instance in which Sweden's declaration of peace of Nov. 7, 1772, supposed the existence of the corresponding declaration of Denmark, which in reality did not occur until two days later, Nov. 9, 1772.) His objective conditions are: (1) [p. 531] material and moral possibility to execute; (2) obligation only

able to reach a more objective point of view than has been developed. The scheme of arrangement chosen, which may be defined as violation according to kind, is:

1. Defective drafting, inducing more or less honest adverse action.
2. Bad faith in contracting.
3. Nonexecution or disregard.
4. Violation by hostile legislation.
5. Deliberate violation.

Historical instances will be cited under the conditions and after application of the tests already set forth.

I. DEFECTIVE DRAFTING

In treaties, above all other public documents, accuracy of language is essential to insure freedom from dispute. A treaty must mean exactly what it says, and it is in large measure due to the readiness with which fine distinctions of meaning may be expressed in French that that language has become the diplomatic tongue, in which all multipartite international treaties or conventions are officially signed and ratified. National translations are valid only as they are good translations, however official they may be. Bipartite treaties are ordinarily signed and ratified in two originals, one language of which is frequently indicated as controlling in case of dispute. It might be supposed that this variation of language would result in numerous difficulties, but it does not; and when it does, the difficulty is ordinarily one of interpretation which a little negotiation serves to dispel. And this is true notwithstanding the rather interesting fact that some official translations — usually all that municipal lawyers consult — are inaccurate. It is another character of linguistic lapse that gives rise to treaty breach, the failure to say what is meant, or its left-handed expression. The misuse, or careless use, of language is too frequent

upon the contracting parties; (3) the right recognized by a treaty to a certain state may not, therefore, be conceded to another state.

Pradier-Fodéré, *Traité*, 2, 716, sec. 1057, says that the four conditions of the validity of treaties, indispensable to their existence, are: capacity of the contractants; their consensus; a certain purpose forming the matter of the engagement; and a licit cause.

for it not to occur in the 100,000 and more pages of extant treaties, but it is rather surprising that it has given beginning to very few violations.

A few may be cited to illustrate how diplomats sometimes nod in their mother tongues or their adoptive tongue, French.

A. PRIOR TO 1848

1. Toward the end of the year 1780 trouble broke out between Great Britain and the States General. Great Britain complained that the Dutch were carrying wood for the construction of vessels to her enemies. The controlling treaty of commerce of December 1, 1674, does not include building timber among the articles of contraband which the subjects of either were forbidden to carry to the enemies of the other, but the English maintained that this prohibition was included in that of aid for warlike objects, a prohibition expressed in the later treaties. France, on the other hand, demanded of the Republic that it convoy ships laden with timber cargoes for France. The English Ministry presented, on March 21, 1780, a memoir claiming warlike assistance from Holland in accordance with a separate article of the treaty of alliance of Westminster of March 3, 1678. The States General not having replied to this memoir, London declared on April 17, 1780, that the subjects of the United Provinces would henceforth be considered as those of neutral Powers not privileged by treaties. All specific provisions destined to favor the liberty of navigation and commerce of Dutch citizens as expressed in different treaties, and especially in the Treaty of Marine, concluded at London, December 1, 1674, were suspended; which naturally relieved England of the ambiguity.

2. Article IX of the Peace of Utrecht between France and Great Britain of April 11, 1713, has regard to Dunkirk, whose fortifications the French king agreed to raze and whose port he contracted to fill at his own expense within a period of five months after the peace, never to repair it. This clause was renewed in all subsequent treaties up to the Peace of Versailles of January 20, 1783, when France secured its final abolition. Louis XIV, taking advantage of the circumstance that the Treaty of Utrecht did not prohibit the right of replacing the

port of Dunkirk by another, began to develop Mardick, a village about a league from Dunkirk, where the port was deeper than the one filled up, and to which he made a canal. This bad faith, due to imperfect wording of the engagement, gave rise to complaints from England which led Louis XIV to issue an order of suspension of the works at Mardick in February, 1715.²⁰

By Article IV of the Treaty of The Hague of January 4, 1717, regularizing the triple alliance of Westminster of May 25, 1716, the King of France promised to execute everything that he had promised in respect to the city of Dunkirk and to omit nothing which Great Britain believed necessary to the entire destruction of the port of Dunkirk. The article continues: "When this treaty is ratified the King of Great Britain and the Seigneurs of the States General may send commissioners to the place to be eye witnesses of the execution of this treaty."

By virtue of this clause in the triple alliance, British commissioners frequently visited Dunkirk to inspect the port, and violated the spirit of the treaty by exerting the right in time of war in 1744 and 1756. It was not until 1783 that France secured final freedom from the bothersome article. The recriminations in respect to Dunkirk continued until that time, and in 1744, among the causes of war with France, England gave French violation of the treaties forbidding the reestablishment of fortification of Dunkirk. By the Convention of Aix la Chapelle of August 2, 1748, Article XVII, it was agreed that Dunkirk would remain fortified on the land side, as it then was, and that on the coast side the basis of the former treaties would be followed.

3. The approach of the French army of Maillebois and the movements of a Prussian corps under the Prince of Anhalt-Dessau, made George II lose hope of guaranteeing the Electorate of Hanover from invasion in 1741. He sent a minister to Paris to announce his intention of maintaining neutrality, and Louis XV sent to Hanover M. de Bussy, minister to London, who signed with Barons Munchausen and Steinberg, the ministers of George II, on October 28, 1741, the treaty

²⁰ Schoell, *Histoire Générale des Traités de Paix*, II, 106; Hall, *op. cit.*, 1st ed., 284; Phillimore, *op. cit.*, 2, sec. LXXIII. The treaty of Utrecht as to Dunkirk stipulates "*nec dicta munimenta, portus, moles, aut aggeres, denuo unquam reficiantur.*"

of neutrality of Hanover, in which it was forgotten to state how long the neutrality should run, a fact which gave a pretext for its speedy rupture.²¹

4. Three separate secret articles were attached to the quadruple alliance of Warsaw of January 8, 1745, between the King of Poland, the Elector of Saxony, the King of Great Britain, the Queen of Hungary and the United Provinces. "To put the Kingdom of Poland more in a state of being useful in the public cause," says the third article, "the King of England and the Queen of Hungary promise to aid the King of Poland in his salutary views to this end, *the more so (d'autant)* as they shall be able to do it, without violating the laws and constitutions of the said Kingdom." The King of Poland desired to assure the succession to his son, but there is an equivocation in the particle *d'autant* (*more so*), in place of which it is doubtless necessary to read *autant* (simply meaning *as much as*) or *en tant* (indicating *in so far as*). It is not evident that this mistake really led to any difficulty, but it is obviously erroneous, as pointed out by Wenck.²²

5. Imperfect wording of Article IX of the Treaty of Aix la Chapelle, April 30, 1748 (preliminary), October 18, 1748 (definitive) gave rise to a dispute in America. This article ordered the restitution of American conquests made during the war, adding that everything should be restored "*sur le pied qu'elles étoient ou devoient être avant la guerre*" (on the basis they were or ought to be before the war). The *devoient être* (ought to be) offered the English a pretext constantly to undertake new expeditions against the French in the north, where the boundaries had never been delimited by treaty. On the other hand, the English replied to this charge that they were only repressing French attempts to extend their boundaries at the expense of their neighbors. The principal difference related to the boundaries of Arcadia or Nova Scotia, which had been ceded by Article XII of the Treaty of Utrecht, "conformably to its ancient boundaries," which, however, were unknown. Commissioners charged with solving this and other difficul-

²¹ Schoell, *Histoire Générale des Traités de Paix*, II, 320-322; Garden, *ibid.*, III, 260.

²² F. A. Wenck, *Codex juris gentium recentissimi*, 2, 471; Schoell, *op. cit.*, II, 361; Garden, *op. cit.*, III, 321-322.

ties sat at Paris from September, 1750, to 1755, when on June 8th the English, convinced that France was simply drawing out the conferences to regain her strength, resumed hostilities.

6. An instance of an ill-advised treaty provision is furnished in Article XXVI of the *Pacte de Famille* of Paris, August 15, 1761, between the branches of the House of Bourbon. By the article the two powers took the engagement reciprocally to confide to each other all alliances which they might effect in the future and to report to each other the negotiations which they might pursue, especially those affecting their common interests. Since the pact stipulated that either must come to the aid of the other in case of war, this provision had some reason; but, since the two states had many interests not in common, it was very difficult to have the engagements executed with entire good faith. Many times Spain complained that France was not abiding by the provision, while France made similar recriminations. The pact, however, was still in existence as late as 1790, when the King of Spain demanded France to make common cause with him. The French National Constituent Assembly, after examining the extent of the engagement, decreed on August 24 that the nation would fulfill the defensive and commercial obligations it had contracted. Article II of the Treaty of Paris of February 10, 1763, between France, Spain, England and Portugal, says that the contractant will religiously observe all previous treaties in all respects in which they are not abrogated by the present treaty, and will not permit any privilege, grace or indulgence contrary to those treaties, unless accorded by the present treaty. Abbé de Mably claims that this article revokes Article XXIII-XXIV of the *Pacte de Famille*, but this seems not to be case, for those articles refer to commerce, and the treaty under discussion is purely political.²³

7. At the negotiation of Udine, before the Treaty of Campo Formio, the French demanded the application of French laws to the Belgian émigrés. This question was mingled with the reunion of Mantua to the Cisalpin Republic and the establishment of the Rhine as a boundary. September 27, 1797, Bonaparte proclaimed the reunion of Mantua to the Cisalpin Republic, leaving to the Court of Vienna the alternative between war and the renunciation of this city, which was regarded as

²³ Schoell, III, 89, 90, 107, 123.

the key of Italy. The Austrian Ministry, having decided to yield the point, relaxed its attitude also on the integrity of the Empire from the side of the Rhine and let itself be dazzled by a system of compensation, in which the prospect of being able to aggrandize itself on the Bavarian side was presented to it. Instead of deciding the third litigious question, regarding the émigrés of Belgium, it was avoided by the use of an equivocal expression which would conciliate those affected by the provision of the French law but which left to the bad faith of the French executive directory a pretext for violating the treaty of Campo Formio. This treaty was drawn up October 17, 1797, and Article IX says:

In all the countries ceded, acquired or exchanged by the present treaty, there will be accorded to all inhabitants and property holders whatsoever the withdrawal of the sequestration placed upon their properties, effects and revenues, on account of the war which has taken place between his Imperial and Royal Majesty and the French Republic, without their being (*sans qu'ils puissent être*) disturbed in this regard in their properties or persons. Those who in the future shall desire to cease living in the said countries shall have to make the declaration thereof three months after the publication of the definitive treaty of peace; they will have the term of three years to sell their movable and immovable property, or to dispose of them according to their desire.

The Austrian plenipotentiaries believed that they had protected the émigrés by the first part of this article, but the French executive directory immediately found a method of eluding this stipulation by pretending that this article could be alleged in favor of those who at the time of signing the treaty were still living in Belgium and not in favor of the old inhabitants, that is, the émigrés. Definite charges of violating the above provision were made by Austria at the Congress of Seltz in 1798. At that time the French negotiator, in eighteen conferences from May 30th to July 5th, was studiously unaware of the condition of the émigrés, and Austria was unable to obtain redress.²⁴

8. The treaty of Mequinez of March 1, 1799, and that of Laraiche of March 6, 1845, established, by intention if not specific provisions, peace between Morocco and Spain at Ceuta. The convention of August 24, 1859, mentioned the other Spanish presidios but was silent

²⁴ Schoell, V, 46, 48, 52, 123.

in respect to Ceuta. At that time it was thought that the tribes of its vicinage were less savage and turbulent than elsewhere and there was not the same need of adopting means of protection against them. The negotiators were deceived in this.²⁵ At the very moment the convention was signed the Anjera tribe committed a particularly grave act of hostility against Ceuta. They rushed the fort built at the Spanish boundary, destroyed its walls, threw the arms of Spain into the water, and massacred the sentinels. A first exchange of diplomatic notes was fruitless, and it was not until after a military campaign that Spain was able to negotiate a treaty of peace and amity at Tetuan on April 26, 1860, which assured the protection of Spanish presidios in general, and, in Article III, of Ceuta in particular. The tribal outbreak seems not to have been in violation of the specific terms of any treaty, though perhaps constructively in contravention of Article XV of that of 1799 and Article I of that of 1845.

9. According to the armistice of Alexandria of June 16, 1800, between France and the Austrian army in Italy, the latter was to occupy Tuscany. This provision was not carried over to the preliminary articles of Paris of July 28, 1800. The French General Brune profited by this fact to occupy Tuscany, although Count de Saint Julien, the French negotiator at Paris, had been promised by the Emperor that the extraordinary levies that had been made were to cease.²⁶

10. Article I of the treaty for the cession of Louisiana by France to the United States of April 30, 1803, has a unique form. It reads:

Whereas by the third Article of the Treaty concluded at St. Ildefonso the 9th Vendemiaire an 9 (1st October, 1800) between the First Consul of the French Republic and his Catholic Majesty it was agreed as follows:

"His Catholic Majesty promises and engages on his part to cede to the French Republic six months after the full and entire execution of the conditions and stipulations herein relative to his Royal Highness the Duke of Parma, the Colony or Province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the Treaties subsequently entered into between Spain and other States."

And whereas in pursuance of the Treaty and particularly of the

²⁵ Rouard de Card, *Les Relations de l'Espagne et du Maroc*, 68-89.

²⁶ Schoell, V, 354.

third article the French Republic has an incontestable title to the domain and to the possession of the said Territory — The First Consul of the French Republic desiring to give to the United States a strong proof of his friendship doth hereby cede to the said United States in the name of the French Republic forever and in full sovereignty the said territory with all its rights and appurtenances as fully and in the same manner as they have been acquired by the French Republic in virtue of the above mentioned Treaty concluded with his Catholic Majesty.²⁷

That the wording of the last paragraph was intentional must be obvious. The fact was that when the American negotiators in Paris were discussing the matter with the French they could get no legal proof of the exact state of execution of the Treaty of San Ildefonso, but it was certain that it had not been completely executed on the part of France, which had promised to secure the recognition by the European Powers of the King of Etruria, and on the part of Spain, which had sought pretexts to avoid the return of Louisiana to France. Under these circumstances, the Americans desired a more specific definition of the boundaries of Louisiana than France was able to furnish geographically. Historical researches failed to provide the necessary facts, and the French negotiator, M. de Marbois, said affairs were too pressing to reach an agreement as to boundaries with Spain, which would probably have to consult its American authorities. Therefore it was agreed that the San Ildefonso article of cession should be incorporated bodily into the Franco-American treaty of cession. "Article I may in time give rise to difficulties," said M. de Marbois. "They are now insurmountable; but if they do not halt you, I desire that your principals should at least know that you have been informed of them." Commenting on this incident, which in reality caused no trouble, Count de Garden makes these just remarks on ambiguity in treaties:

It is important not to introduce ambiguous clauses into treaties. However, the American plenipotentiaries made no objections; and if in appearing to be resigned to these general terms from necessity they in fact found them preferable to more precise provisions, it is necessary to admit that the event justified their foresight. The coasts of

²⁷ Appended to the treaty also is the full text of the Treaty of San Ildefonso. See Malloy, *Treaties, Conventions, etc.*, 506-511; *Compilation of Treaties in Force*, 257-262.

the Pacific were not certainly included in the cession, but the United States has long been established there.

The French negotiator in rendering a report to the first Consul (Napoleon) of the conference remarked the obscurity of this article and the inconvenience of a provision so uncertain. He got as a reply to his remark: "If the obscurity was not there, it might have been good politics to put it in." We have related this reply to have occasion to say that the article was well justified by circumstances and that political science disavows all obscure stipulations. If they are some times convenient at the time of a difficult negotiation, they may in future be the subject of the greatest embarrassment.²⁸

11. On September 2-5, 1807, the British fleet bombarded Copenhagen. It will be remembered that Nelson at Copenhagen six years before, himself a subordinate, on being informed that his superior flag officer was signaling to cease firing, put the telescope to his blind eye; and, after pointing it long and hard in the proper direction, asserted that he saw nothing, and continued fighting. On September 5 General Peymann asked for an armistice to treat as to a capitulation, which was signed the 7th. Article III states that vessels and ships of all kinds, as well as all naval stores and stocks thereof, belonging to his Danish Majesty, would be placed under guard of persons designated by the British commander-in-chief. These persons were to take possession without delay of the docks and all magazines and ships at them. The Danish Prince Royal sent orders to General Peymann to destroy the fleet rather than to allow its being delivered up. The officer carrying this order was captured at the moment when he was entering Copenhagen. Partly due to this unsuccessful coup, the English translated Article III very broadly, and it was charged that they extended the words "naval stores" to cover the destruction of all dock machinery which they could not carry away. The North German newspapers were particularly bitter on this point, but the English papers on the contrary alleged that they left the Danes so large a quantity of naval stores that they were able to equip a new fleet immediately after the leaving of the English ships.²⁹

²⁸ Garden, *op. cit.*, VIII, 75.

²⁹ Schoell, IX, 68-71.

B. AFTER 1848

It would not be true to say that imperfect wording of treaties no longer serves to create violation, but it is an obsolescent form of intentional breach. States in these days struggle for stability rather than temporary diplomatic advantages. Disputes over the wording of their engagements occur, but ordinarily they are honest disputes and are settled by negotiations, court or arbitral interpretation. The controversy over the Panama Canal tolls exemption even gives an instance of settlement of such a dispute by legislative action before any possible violation; for in essence the difference was whether the treaty stipulation of equal treatment "to all nations" was intended to include or exclude the United States. Both the opinion of the President and the testimony of surviving negotiators pointed to an original intention to include the United States, and Congress accepted that view. Imperfect wording of treaties at present most frequently occurs in the relations between states of different civilizations, especially those with non-occidental languages.

12. On July 3, 1880, was signed the convention of Madrid to regulate protection in Morocco. Of this treaty

the Arabic original is alone recognized by the Moorish Government, as being that signed for the Sultan. Literally translated, this says in Article 5: "They [the foreign representatives] have no right to employ even one Moorish subject against whom there is a claim (*da'wah*)"; and further on in paragraph 4: "No protection shall be given to anyone who is under prosecution (*jartmah*) before the sentence is given by the authorities of the country." As nearly as it can be translated, *da'wah shar'iah* (or, as it is more commonly called, *da'wah* only) means a civil case, and *jartmah* a criminal one. In the English text of the treaty (translated from the French original) the sentence quoted above read: "They shall not be permitted to employ any subject of Morocco who is under prosecution," and, "The right of protection shall not be exercised toward persons under prosecution for an offense or crime," etc. From this the Moors argue, with a good show of right, that no one under prosecution, whether the suit be civil or criminal, can be protected by a foreign power, the fact being that they do not know the distinction between them that we do, and that according to their copy of the treaty, both civil and criminal cases prevent protection.³⁰

³⁰ Budgett Meakin, *The Moorish Empire*, 228 note; *Treaties, Conventions, etc.*, 1776-1909, 1223; *Treaties in Force*, 563.

13. A complementary treaty signed at Madrid, October 30, 1861, between Spain and Morocco for the regulation of difficulties arising from the convention of August 24, 1859, and the treaty of peace of April 26, 1860, provided for fixing the boundaries of Melilla, and an act for the limitation of its territory was signed at Tangier, June 26, 1862. The provisions relative to this delimitation were executed in a very imperfect and incomplete manner. One feature of the delimitation was a sort of neutral zone, in which the marabout and cemetery of Sidi Uriak were allowed to remain. Toward the close of 1893 the Spanish authorities, supposedly under Article VII of the treaty of April 26, 1860, which provides that Spain may adopt "all the measures that it shall consider opportune for the safety of these territories, and cause the erection of all fortifications and defenses that it shall believe convenient without the Moroccan authorities ever being able to put obstacles in the way," undertook to construct a fort on the territory belonging to Spain in the vicinity of the marabout of Sidi Uriak. The tribesmen alleged that the works profaned the cemetery. They addressed a claim to the governor of Melilla presidio and, not receiving prompt satisfaction, gathered the other tribes and furiously attacked the Spanish garrison, which was rather thoroughly wiped out. By the convention of March 5, 1894, signed at Marrakesh, the incident was ended by the closing of the cemetery and some exchange of money. An additional convention of February 24, 1895, signed at Madrid put the Sultan under engagements to carry out the preceding agreement.³¹

14. A case of violation in a dynastic sense is to be found in the convention between Great Britain and Portugal by which the crown of the latter is guaranteed to the lawful heir of the House of Braganza, the British Government promising never to recognize any other ruler. This treaty was signed at London, October 22, 1807, and was part of the Anglo-Portuguese alliance series, of which the others are: London, June 16, 1373; Windsor, May 9, 1386; London, January 29, 1642; Westminster, July 10, 1654; Whitehall, April 28, 1660, and June 23, 1661, and Lisbon, May 16, 1703.³² The provision in question was

³¹ Rouard de Card, *Les Relations de l'Espagne et du Maroc*, 155-165, 192-194, 201, 223, 226.

³² It is often asserted that the treaties of the Anglo-Portuguese alliance are

confirmed by the Treaty of Rio de Janeiro in 1810, after the Braganzas had become settled in Brazil, and by the Treaty of Vienna of January 22, 1815, between the two states which provides:

The treaty of alliance at Rio de Janeiro of the 10th February, 1810, being founded on temporary circumstances, which have happily ceased to exist, the said treaty is hereby declared to be of no effect; without prejudice, however, to the ancient treaties of alliance, friendship and guaranty which have so long and so happily subsisted between the two crowns, and which are hereby renewed by the high contracting parties, and acknowledged to be of full force and effect.

Thus the treaty provision of 1807 was revised, and when Manuel of the Braganzas was succeeded by the republic, which Great Britain recognized, the London Government found itself violating the treaty, but with the full sanction of the other sovereign, the rulers of republican Portugal. This instance of faulty wording is, of course, only an anachronism. The careful methods of modern diplomacy would instinctively dictate referring not to "the two crowns" but to the "two high contracting parties."

DENYS P. MYERS.

secret. Wheaton knew them and anybody may find them in British and Foreign State Papers, I; 412 ff.

CONFLICTS BETWEEN INTERNATIONAL LAW AND TREATIES

IN protesting against the decision of the Central American Court of Justice in the recent case of *Costa Rica v. Nicaragua*, the latter government says:

It does not, and cannot, admit the unrestricted power that the court arrogates to itself to take cognizance of all the differences that may arise between the Central American States, . . . because no nation on earth would submit to the arbitrament of strangers its security and preservation. . . .¹

In reply the court supported its decision, which had denied the capacity of Nicaragua to conclude the Bryan-Chamorro Treaty with the United States, and said:

It must be evident, then, that if this strange reasoning were to find support among the other governments signatory to the Treaties of Washington, then at once, and perhaps forever, would be effaced an institution that now stands as the worthiest conquest of civilization, one of which the Central American States have been justly boastful and for which they have well merited the applause and admiration of the whole world.²

In his editorial comment on this case in the January number of this JOURNAL, Professor Brown remarked: "The most significant point of international law raised by this whole controversy is the right of a state in its sovereign capacity to negotiate as a free agent with another sovereign state concerning matters of vital interest to other neighboring states." He concludes: "We need to recognize, in place of the archaic theory of sovereignty, the great principle, the fundamental reality of the mutual dependence, the common interests of the world."³

It was this need which the Central American Court recognized in upholding its jurisdiction, and which it regarded as its very *raison d'être*.

¹ This JOURNAL, Supplement, 11: 5. ² *Ibid.* ³ This JOURNAL, 11: 158, 159.

In a previous article in this JOURNAL⁴ the conclusion was reached, that when the state expresses its will definitely, as through a statute, courts will recognize such a source of law as superior to international law and apply the statute in case of a conflict. Statutes, however, ordinarily apply only within the territory of the state.⁵ They are pronouncements of the internal sovereignty of the state. Thus, within its boundaries, judicial practice recognizes that the state enjoys *l'autonomie de la volonté*.⁶ Is there a similar judicial recognition of the external sovereignty of the state? The very idea of international law seems to imply that the external activity of the state is limited by law,⁷ but ordinary courts of justice, because of their limited jurisdiction, cannot often consider cases involving such activity.⁸ There is, however, one type of case in which they may do so, that in which a conflict arises between the immediate will of the state as expressed in a treaty and international law.

How far has general practice recognized that the capacity of a state

⁴ Conflicts of International Law with National Laws and Ordinances, this JOURNAL, 11: 1.

⁵ "All legislation is *prima facie* territorial.' Words having universal scope such as 'every contract in restraint of trade'. . . will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator may subsequently be able to catch." Justice Holmes, in *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909).

⁶ Even here the expression of the state's will must be unequivocal. Thus less definite sources of municipal law, such as executive orders, judicial precedents, etc., will not always stand in the way of the application of international law, even in case of a clear conflict, and municipal law will always be interpreted in harmony with international law if possible. See this JOURNAL, 11: 1.

⁷ The theory of sovereignty can be saved even here by assuming that the law is formed by agreement, in which case the will of each is not limited because it forms a voluntary component of the *volonté générale*. We speak, however, of sovereignty in the legal sense which gives meaning to the phrase, "The king can do no wrong." It is very clear that the will of the "sovereign" as expressed today by king, or president, or legislature, may not be in accord with the *volonté générale* embodied in international law, even though the "sovereign" may have "agreed" to that law in the past.

⁸ Judicial recourse to the doctrine of "political questions," "acts of state," and "*actes du gouvernement*," usually means that on matters relating to external sovereignty the courts have no jurisdiction and so will regard the acts of political agencies of the government as facts to be accepted, not as legal questions to be judged.

to conclude treaties is limited by customary international law and treaties which it has previously concluded with third states? The question can be answered by considering the relative legal weight given to treaties and international law. If a treaty provision in conflict with a rule of international law or an earlier treaty is held to be inoperative by a national or international court, an actual limitation has been imposed upon the power of the state to contract. Sovereignty has been compelled to bow before the law.

Conflicts of international law (1) with treaties affecting nonsignatories, (2) with treaties affecting only signatories ⁹ and (3) conflicts between two treaties, will be considered successively.

CONFLICTS OF INTERNATIONAL LAW WITH TREATIES AFFECTING NONSIGNATORIES

Some writers have maintained that treaties in certain cases, as, for instance, when meliorating the harshness of earlier practice,¹⁰ form a true source of international law and are obligatory even toward nonsignatories. Wheaton said in his first edition:

The effect of treaties and conventions between nations is not necessarily restricted, as Rutherforth has supposed, to those states who are direct parties to these compacts. They can not indeed modify the original and pre-existing international law to the disadvantage of those states who are not direct parties to the particular treaty in question. But if such a treaty relaxes the rigor of the primitive law of nations in their favor, or is merely declaratory of the pre-existing law, or furnishes a more definite rule in cases where the practice of different states has given rise to conflicting pretensions, the conventional law thus introduced is not only obligatory as between the contracting parties, but constitutes a rule, to be observed by them towards all the rest of the world.¹¹

⁹ By signatories is meant states which have signed and ratified the treaty and exchanged ratifications. A state which has signed but not ratified a treaty is legally in the same situation as a state which has had nothing to do with the instrument.

¹⁰ Examples are furnished by Article 12 of the treaty between the United States and Italy of 1871 abolishing the right of capturing enemy property at sea, and prior to 1856 by the numerous treaties providing for free ships, free goods. Many provisions of the Hague Conventions, as, for instance, No. XI, 1907, Article 5, exempting the crew of captured enemy merchant ships from detention as prisoners of war, are also meliorations of customary international law.

¹¹ Henry Wheaton, *The Elements of International Law*, 1st ed., Philadelphia, 1836, p. 50. As authority, Lord Grenville's speech in the House of Lords, Nov. 13,

Wheaton omitted this paragraph from the last edition revised by himself (1848), and the statement, except in reference to treaties declaratory of international law, now receives no support. The proper rule seems to be that treaties need be observed only to the advantage of signatories, a condition expressly recognized in the Hague Conventions;¹² in a number of arbitration treaties concluded by the United States, which specifically exclude matters affecting third states from the scope of the arbitral agreement;¹³ and in numerous other treaties, in terms requiring observance toward signatories alone.¹⁴ A state by signing a treaty does not obligate itself to observe its provisions toward third states,¹⁵ although a treaty worded in universal terms, relaxing the severity of customary international law, is apt to furnish a strong diplomatic argument against a signatory state by a nonsignatory claimant.¹⁶

1801 (Hansard, 36: 232, abstracted in Wheaton, *History of the Law of Nations*, N. Y., 1845, p. 408 *et seq.*), is cited, in which Lord Grenville opposed ratification of the treaty of June 17, 1801 with Russia on the ground, among others, that the meliorations of international law therein provided would be required of Great Britain by nonsignatory states. Marten's *Précis du droit des Gens*, Paris, 1831, 1: 45, sec. 7, and Klüber, *Droit des Gens*, Paris, 1831, 1: 5, sec. 3 have been cited as of this opinion (Reddie, *Inquiries in International Law*, London, 1842, 157), but they appear to have been misunderstood (Ortolan, *Diplomatie de la mer*, Paris, 1856, 2: 442; Twiss, *Law of Nations*, Oxford, 1861, 1: 132), their actual view going little farther than that of Bynkershoek, that numerous treaties with a similar content furnish evidence of accepted international law. Twiss discusses the question at length, with the conclusion that a treaty relaxing a rule of international law may extend to other nations, "but this indirect result will depend not upon the force of the convention as a contract, for that only binds the parties to it, but on certain considerations of right (*jus dehors* the treaty.)"

¹² Most law-making conventions have in terms limited their operation to signatories. The Declaration of Paris, for instance, says "The present declaration is and shall be obligatory only among the Powers who have or who shall have acceded to it."

¹³ As an example see treaty with Great Britain, 1908, Article 1, Malloy, *Treaties*, p. 814.

¹⁴ In the treaty between the United States and Russia of 1854 the contracting parties recognized the principles of free ships, free goods, and the freedom of neutral goods in enemy ships as "permanent and immutable," but only engaged "to apply these principles to the commerce and navigation of such Powers and states as shall consent to adopt them on their part as permanent and immutable." Malloy, p. 1520.

¹⁵ Dana, note to Wheaton, p. 610; Twiss, *op. cit.*, 1: 134 *et seq.*

¹⁶ This point was discussed by Lord Grenville in the debate in the House of

It is all the more true that third states cannot be expected to observe or to acquiesce in rules acting to their disadvantage, because of treaties to which they are not signatory.¹⁷ England was certainly under no legal obligation to observe the Armed Neutralities of 1780 and 1800, or the United States to observe the Declaration of Paris during her Civil War,¹⁸ except in so far as these treaties were merely declaratory of customary international law.

The courts have held that the principle of enemy ships enemy goods, which was contained in a large number of treaties of the eighteenth and early nineteenth centuries, could not be applied as to property of a nonsignatory neutral in an enemy vessel.¹⁹ By Article 19 of the treaty between Portugal and England of 1654 it was agreed that either state should restore the prizes of the other brought to its ports. Soon after the conclusion of this treaty, England being neutral, Sir Leoline Jenkins advised against the application of this provision with reference to a Portuguese vessel brought into an English port by a French privateer, on the ground that it deprived the belligerent captor, a nonsignatory, of a just right under customary international law. He said:

The law of nations as it is at this day observed, seems not to pass any obligation on your Majesty to impart your royal protection unto

Lords on the treaty with Russia of June 17, 1801, which embodied some of the principles of the second Armed Neutrality, Hansard, 36: 18, 200, 232; Sir R. Phillimore, *Commentaries upon International Law*, 3d ed., London, 1879-1889, 1:46.

¹⁷ Phillimore, *op. cit.*, 1: 46; Twiss, *op. cit.*, 1: 136 *et seq.*

¹⁸ Dana's Wheaton, pp. 456, 586, 608.

¹⁹ *The Nereide*, 9 Cranch 388. This rule was not followed in *Bolcher v. Darrell*, Fed. Cas. 1607 (1795), the facts of which were as follows: France, being at war with Spain, a French privateer brought a Spanish prize laden with slaves to an American port. Darrell, acting as the agent of an Englishman, Savage, who held a mortgage against the Spanish slave-trader, seized and sold the slaves, contending that the mortgagee being neutral, the slaves were neutral property and hence were exempt from capture by the French privateer, although in an enemy bottom. The court, however, held that the provision of the French treaty declaring for "enemy ships enemy goods" rendered the slaves enemy and ordered their return to Bolcher, the French privateer, saying, "It is certain that the law of nations would adjudge neutral property so circumstanced to be restored to its neutral owner, but the fourteenth article of the treaty with France alters that law by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited." Here the sufferer was a neutral Englishman not party to the treaty.

one friend to the prejudice of another; this captor being *jure belli*, which is a very good title, in full and quiet possession of his prize . . . will take it for an act of partiality to have it now wrested out of his hands and given to his enemies; whereas no man's condition is to be made worse than another's in a place that is reputed of a common security upon the public faith.²⁰

The advice to apply international law rather than the treaty is delivered with caution, and concludes with the remark:

But I am taught that your Majesty's treaties with foreign nations are not to be any part of our speculations or debate in the court of admiralty, but to be interpreted by your Majesty's own judgment with the advice of your most honorable Privy Council.

It is interesting to compare this case with that of the *Appam*,²¹ two and a half centuries later. The facts were similar, but international law had changed. In the latter case, the United States as a neutral restored a British vessel brought in as a prize by a German crew. The court said:

The principles of international law recognized by this government, leaving the treaty aside, would not permit the ports of the United States to be thus used by belligerents. If such were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes captured by one of the belligerents might be safely brought and indefinitely kept. . . . The violation of American neutrality is the basis of jurisdiction and the admiralty courts may order restitution for a violation of such neutrality.

Germany claimed the right to sequester her prize in the American port under Article 19 of the treaty between the United States and Prussia of 1799.²² This was held inapplicable, as it referred to prizes conducted by war vessels, not to unaccompanied prizes. It is questionable, however, whether if the treaty had been in point it would have been proper for the United States to apply it, for to do so would

²⁰ William Wynne, *The Life of Sir Leoline Jenkins*, London, 1724, 2: 732. Lord Stowell supported this opinion in 1798. "Now I have no scruple in saying, this is an article incapable of being carried into literal execution, according to the modern understanding of the law of nations; for no neutral country can interfere to wrest from a belligerent prizes lawfully taken." *The Santa Cruz*, 1 C. Rob. 49 (1798). See also, Phillimore, *op. cit.*, 2: 143.

²¹ *The Appam*, March 17, 1916, this JOURNAL, 11: 448, 453.

²² Malloy, p. 1492, revived by treaty of 1828, Art. 12, *ibid.*, p. 1499.

have been to act in derogation of the international obligations of neutrals to the disadvantage of Germany's enemies not parties to the treaty of 1799.

Another example of the application of customary international law when conflicting with treaties affecting third parties is found in the American neutrality policy after 1793. France claimed privileges of outfitting privateers and disposing of prizes in American ports under the treaty of 1778. While the American courts at first allowed a restricted application of the treaty,²¹ later a strict policy of neutrality was maintained, and upon French retaliation for alleged nonfulfillment of the treaty by the United States, it was abrogated by an act of Congress.²²

As a final illustration of this principle may be cited the recent decision of the Central American Court of Justice in the case of Salvador v. Nicaragua, holding that Article 2 of the Bryan-Chamorro Treaty of 1914 between Nicaragua and the United States, granting the United States a ninety-nine year lease of a naval station on Nicaraguan territory on the Gulf of Fonseca, could not be applied as in derogation of the international rights of Salvador and Honduras to "condominium" in the gulf.²³

The theory of a general obligation flowing from treaties appears more reasonable in reference to great "law-making"²⁴ conventions of which large numbers of states are signatory, but it is believed that even here it cannot be applied as a legal principle. Such conventions may be divided into three classes:²⁵ 1. international settlements, 2. international law-making, and 3. international cooperation.

The first class consists of the great treaties of peace, such as those of Westphalia 1648, Utrecht 1713, Vienna 1815, Paris 1856, Berlin 1878, and treaties establishing boundaries, or status, such as the various neutralization treaties. Such treaties establish and define the entities which are to be subjects of international law for an indef-

²¹ *The Avery*, Fed. Cas. 9741.

²² Act of July 7, 1798, 1 Stat. 578. On the controversy between France and the United States, see Moore's Digest, 5:591, et seq.

²³ Decision rendered March, 1917; printed in this JOURNAL 1917, p. 674.

²⁴ The term is suggested by Oppenheim, *International Law*, I:23, 518.

²⁵ This classification and terminology are used by Pictet Cokken, *Cases and Opinions on International Law*, London, 1909, 1:19.

nite future period and might be spoken of collectively as the constitution of the family of nations. Are such treaties of general obligation? Could a nonsignatory state reopen a boundary dispute settled by such a treaty? Could a state other than Great Britain protest to the United States against tolls discriminations in the use of the Panama Canal on the basis of the Hay-Pauncefote Treaty of 1901? Could a neutralized state invoke the neutralization treaty as against aggression by a state not a party to that treaty, or would a third state have a legal ground of protest against a declaration of war upon a neutralized state? Visscher, in speaking of the Belgian neutralization treaty, says:²⁸ "In the case in point the violation of these treaties implies more than the rupture of a contract: it constitutes a disregard of an objective rule of international law."

There appear to be no formal decisions on such a question as this, but it is believed that while the provisions of treaties establishing a permanent condition of things may be of universal obligation, this results from the general acceptance and acquiescence in their terms by all states, not from the treaty itself. Thus, to invoke such a treaty against or in behalf of a nonsignatory state, a tacit acceptance of the conditions in question would have to be shown.

The second class of "law-making treaties" consists of such conventions as the Declaration of Paris, the Geneva and Hague Conventions, and the Declaration of London. They establish rules and principles of international law and are by analogy sometimes spoken of as codes and statutes of the world society. However, it is clear that the analogy cannot serve to attribute to such conventions a general obligation. They are usually limited in terms to the signatories, and although frequently cited in diplomatic correspondence where one or both parties are not signatories, this is done on the assumption that the article cited is merely declaratory of customary international law.²⁹

²⁸ C. Visscher, *Belgium's Case*, London, 1916, p. 17.

²⁹ As an instance, see the correspondence between Germany and the United States in the case of the *William P. Frye*. (This JOURNAL, Special Supplements, 9: 180, 10: 345.) Both the Declaration of London and the Prussian-American Treaty of 1799 were frequently cited, but in a very different manner. The former, which was not ratified at all, merely as evidence of international law, and the latter as a binding obligation.

As conventional obligations they are only binding upon signatories, though by their general acceptance they are of high value in determining what the rule of customary international law is.³⁰

The third class of general international conventions comprise such documents as the General Act for the Repression of the African Slave Trade, the Universal Postal Convention, the International Sanitary Convention, etc. They establish international administrative bureaus and regulations for their operation. They are in terms and by their nature effective only as between signatories.

Treaties may, as Bynkershoek insists, furnish evidence of customary international law by which nonsignatory states are bound, but the obligation flows from the customary law, not the treaty.³¹ Treaties as such are of effect only within the legal order composed of the signatories, and there would certainly be grounds of protest if a state attempted to apply a treaty to the disadvantage of a party whose state was not signatory. Customary international law supersedes treaty provisions where rights of nonsignatories are involved.³²

³⁰ The preamble to the Declaration of London states the purpose of the conference to have been "to determine together as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of the 18th October, 1907, relative to the establishment of an International Prize Court."

³¹ Bynkershoek, *Ques. Jur. Pub.*, lib. 1, c. 10, ed. 1752, 1: 77, cited Dana's *Wheaton*, sec. 15, p. 24; Phillimore, *op. cit.*, 1: 48; Twiss, *op. cit.*, 1: 135. See also the *Maria*, 1 C. Rob. 360; Martens, *op. cit.*, 1: 45, sec. 7; Klüber, *op. cit.*, 1: 5, sec. 3.

³² The most noteworthy failures to apply this rule have been in the case of treaties giving special privileges in time of war. The operation of such a treaty by a neutral is necessarily an infraction of the rights of third parties under customary international law, for it involves a violation of the neutral's duty of impartiality. Treaties of the seventeenth and eighteenth centuries frequently permitted the levy of troops in the territory of one of the signatories when neutral. These are now all obsolete as clearly in derogation of customary international law, but levies were permitted under them in the latter part of the eighteenth century, notably by neutral German states to Great Britain in the American Revolution. (See Hall, *International Law*, 4th ed., pp. 601 *et seq.*) The special privileges of bringing in prizes and repairing privateers in American ports granted to France by the treaty of 1778 have already been mentioned. In a few cases the United States courts held that the prizes taken by French vessels brought into American ports could not be restored on account of contraventions of customary international law if the acts were within the treaty privileges. See the *Phoebe Ann*, 3 Dall. 319, the *Friendship*, Fed. Cas. 3291, the *Amity*, Fed. Cas. 9741. See also Moore, 5: 591-593. These

CONFLICTS OF INTERNATIONAL LAW WITH TREATIES AFFECTING
ONLY SIGNATORIES

Where only signatories are concerned, as a general principle the reverse will be true, and treaties will take precedence of customary international law. Courts have, however, sometimes applied customary international law in the case of such a conflict, on the ground that the treaty was intended to be declaratory of international law which had subsequently changed. Thus, although a number of its early treaties required the carriage of sea letters or passports by merchantmen of the signatories when neutral, on penalty of forfeiture as probable enemy vessels, the United States prize courts have not condemned such vessels if other evidence showed a genuine neutral character.³³ The advantages of customary international law have been thus applied in spite of the treaty.

Treaties have generally been interpreted so as not to conflict with customary international law. Thus a British treaty with Sweden of 1666 forbade either signatory to "lend" ships to an enemy of the other. The British captors of a Swedish vessel, *The Ringende Jacob*, sought its condemnation, on the ground that by carrying on contraband trade it had been "lent" to the enemy and hence was confiscable under the treaty. Lord Stowell interpreted the provision as meaning a putting in entire control of the enemy and hence reconciled the treaty to the then existing rule of international law which released neutral vessels carrying a small amount of contraband. The court admitted that customary international law of the time when the treaty was made had required the condemnation of vessels engaged in contraband trade, but the owners were entitled to the benefit of the relaxed prac-

privileges not only conflicted with customary international law, but with the Jay Treaty with Great Britain of 1794. A recent example of similar character is furnished by the permission of Portugal to let British troops pass across its territory in South Africa during the Boer War, in accord with Art. 11 of the treaty of June 11, 1891. (Martens, *N. R. G.* ii, 18: 185.) This was of obvious disadvantage to the enemy of Great Britain, a nonsignatory of the treaty. For this and other examples see L. Oppenheim, *International Law*, 2d ed., New York, 1912, 2: 371-372.

³³ The *Amiable Isabella*, 6 Wheat. 1, in reference to Art. 17, of the treaty with Spain, 1795, Malloy, p. 1647. *The Pizarro*, 2 Wheat. 227; the *Venus*, 27 Ct. Cl. 116 (1892).

tice of modern international law.³⁴ This decision is particularly strong because to the disadvantage of the government whose court rendered it, and indicates that treaties will generally be interpreted so as not to derogate from rights recognized under customary international law.

The Alaskan boundary arbitration of 1903 was a notable instance of the interpretation of a treaty in harmony with international law, especially with the principle of prescription.³⁵ In fact, the Canadian Commissioners dissented from the opinion of the tribunal on the ground that international law and public policy rather than the treaties had guided the majority.

CONFLICTS BETWEEN TWO TREATIES

Where the provisions of two treaties are in conflict, the proper rule would seem to require that where the signatories are the same, the later rules,³⁶ but where the signatories are different the earlier rules, for in that case one of the signatories of the first treaty, not having assented to its abrogation, the other signatory was not competent to abrogate it alone, by the conclusion of a conflicting treaty with a third state.³⁷ Such a conflict arose between Article 17 of the treaty of the

³⁴ *The Ringende Jacob*, 1 C. Rob. 89 (1796); Phillimore, *op. cit.*, 1: 42.

³⁵ British and Foreign State Papers, vol. 96; Pitt Cobbett, *op. cit.*, 1: 96.

³⁶ Cushing, Att. Gen., 6 Op. 291. There are numerous cases of treaties made specifically to supersede earlier treaties with the same party, as for example the Hay-Pauncefote Treaty concluded by the United States with Great Britain in 1901 to supersede the Clayton-Bulwer Treaty of 1850, in reference to the Panama Canal. The Hague Conventions undoubtedly have superseded numerous bilateral treaties, thus treaties requiring one signatory when neutral to furnish a limited aid to the other when belligerent by contingents of troops, passage of troops across territory, embargo of arms, or use of ports for replenishing cruisers see Oppenheim, *op. cit.*, §: 372), undoubtedly conflict with the fifth and thirteenth Hague Conventions of 1907 which require neutrals to observe impartiality and to prevent the unneutral use of their territory by belligerents. Such a treaty as this, which is largely declaratory of customary international law, would undoubtedly take precedence of the earlier treaty, even though both parties of the latter were not signatories of the former. In so far, however, as the Hague Conventions are not merely declaratory of preexisting law, the rule that a special treaty supersedes a general one would apply.

³⁷ Phillimore, *op. cit.*, 1: 44; Vattel, Bk. 2, c. 12, sec. 165; c. 2, sec. 27; Dallos, Rept. t. 42, 1st part (1861), s. r. *Traité international*, No. 152; Pradier-Fodéré,

United States with France of 1778 and Article 24 of the treaty with England of 1794. The former required the United States to admit French privateers and their prizes to American ports for purposes of repair and supplies, whereas the latter required her to forbid all belligerent privateers these privileges.³⁸ In the case of the *Amity*,³⁹ a British vessel taken prize by the French and sold in the United States, the United States court admitted the validity of the earlier French treaty, and refused jurisdiction, but it later became evident that these privileges were incompatible with the obligations of neutrality imposed by customary international law, and the French treaty was abrogated by legislative act in 1798.⁴⁰

A conflict appears to exist between the Hay-Varilla Treaty, concluded by the United States with Panama in 1903, and the Hay-Pauncefote Treaty previously concluded with Great Britain in 1901. Article 19 of the former exempts vessels of Panama from all tolls in using the Panama Canal, while Article 3 of the latter requires equality of tolls to the vessels of all nations using the canal. Section 5 of the Panama Canal Act of August 24, 1912, recognizes the exemption of Panama vessels. Great Britain protested against the exemption given to American vessels, also contained in this section, and in the same note made mention of the Panama exemption as being also contrary to the Hay-Pauncefote Treaty, but did not insist upon it.⁴¹ This treaty conflict

Traité de droit international public, Paris, 1885-1906, Vol. 2, sec. 1013; W. Kaufmann, *Die Rechtskraft des Internationalen Rechtes*, Stuttgart, 1899, pp. 38, 85.

³⁸ See treaty United States-France, 1778, Arts. 17, 19, 22; treaty United States-Great Britain, 1794 (Jay Treaty), Arts. 24, 25. It is not clear that the French treaty actually gave the wide privileges claimed for it by the French (see Moore, 5: 591-598), nor that the British treaty was in conflict with it, if correctly interpreted. While the 24th Article of the latter categorically forbids the arming of privateers, their provisioning more than sufficient to reach the nearest home port, and the sale of prizes in neutral ports, the 25th Article, which prohibits the giving of "shelter and refuge" to privateers with prizes, makes express exception in case of obligations of prior treaties.

³⁹ The *Amity*, Fed. Cas. 9741 (1796). See also the *Phoebe Ann.* 3 Dall. 319; the *Friendship*, Fed. Cas. 3291.

⁴⁰ Act of July 7, 1798, 1 Stat. 578, Moore, 5: 356.

⁴¹ See note of Sir E. Grey, Nov. 14, 1912; reply of Mr. Knox, Secretary of State, Jan. 17, 1913 (Diplomatic History of the Panama Canal, pp. 91, 95). The whole question is discussed in L. Oppenheim, *The Panama Canal Conflict*, Cambridge, 1913,

does not seem to have come before the courts, and it is highly probable that, in view of the peculiar position of Panama in reference to the canal, the exemption of her vessels from tolls being one of the conditions upon which she permitted the canal to be constructed, this exemption will not be seriously questioned. The Act of June 15, 1914, repealing the exemption of American vessels from tolls, continues the Panama exemption.

The recent decision of the Central American Court of Justice in the case of *Costa Rica v. Nicaragua*⁴² involves a conflict between two treaties. Costa Rica alleged that article 1 of the Bryan-Chamorro Treaty of 1914 between Nicaragua and the United States, whereby the United States obtained the exclusive right of constructing a canal across Nicaraguan territory, was in conflict with the Canas-Jerez Treaty of 1858 between Costa Rica and Nicaragua as interpreted in an arbitral award given by President Cleveland in 1888. Under this treaty, in view of the fact that the only practicable canal route in this region would include the San Juan River, which formed part of the boundary between Costa Rica and Nicaragua, Costa Rica claimed the right to be consulted on any canal project affecting her interests and to give an opinion more than "advisory" in case her "natural rights" were affected. The decision in favor of Costa Rica upheld the earlier as against the later treaty.

The principles applicable to conflicts between international law and treaties may be summarized as follows:

(1) Treaties are of legal validity only as between signatories and are superseded by customary international law in determining the rights of nonsignatories, when no statutory rule exists.

p. 48. The exemption of Colombian vessels from tolls was provided by Article 17 of the unratified treaty of 1903, by Article 1 of the unratified tripartite treaties of 1909 between Colombia, Panama, and the United States, and by Article 2 of the proposed treaty of 1914. (Charles, *Treaties*, pp. 223, 234.) Great Britain ultimately consented to this exemption, in view of the "entirely special and exceptional position of Colombia toward the Canal." Mr. Bryce to Mr. Bacon, Feb. 24, 1909, *Diplomatic History of the Panama Canal*, Senate Doc. No. 474, 63d Cong., 2d sess., p. 51.)

⁴² *Costa Rica v. Nicaragua*, Sept. 30, 1916, this JOURNAL, 11: 181; answer of court to protest of Nicaragua, *ibid.*, Supplement, 11: 3; editorial comment, *ibid.*, 11: 156.

(2) Treaties ordinarily take precedence of customary international law in determining the rights of signatories, but when derogating from rights of nonsignatories under customary international law, or from rights of signatories recognized by that law since the conclusion of the treaty, they will generally be interpreted in harmony with it.

(3) Where two treaties are in conflict, courts will generally give precedence to the earlier if the signatories are different; to the later if they are the same.

It thus appears that states do not enjoy unlimited freedom of contract, but limitations imposed by both their own prior acts and customary international law may be enforced through the action of national and international courts.

QUINCY WRIGHT.

HUGO GROTIUS. DIPLOMATIST

THE heroic siege of Leiden had been history for eight years, the world-famous university of that name was still in its infancy, when there came into the world the man who was destined to become the foremost scholar, theologian, lawyer, statesman, and diplomatist of his age, and a poet and historian by no means insignificant. Huig or Hugo de Groot, named after his grandfather, and better known by the Latinized form of the name, Grotius, was born in Delft on Easter Sunday, the 16th of April, 1583, at a time when all of Europe was overwhelmed with black clouds of massacre, assassination and war. Indeed, the outlook for the future was no more bright, for the Thirty Years' War, called the last of the religious wars of Europe, was coming with the swiftness of fate.

Behind the boy spread a long line of illustrious ancestors, all of whom had been actively engaged in the service of the state, his father having been many times elected Burgomaster of Delft, and having served as one of the Curators of the University of Leiden as well as Councillor of State. We are told that the name de Groot — the Great — had been given to his ancestors in recognition and appreciation of lives spent in unselfish service of the country. Yet the shade of the family tree seems to have held forth no allurements to the son, who was entitled to the protection of its branches. From his boyhood, a boyhood endowed with the precocity of genius, he labored to prepare himself for the arduous tasks which loomed ahead. Mind and body alike were subjugated to his will.

Before the boy was seven years of age he was deep in the study of Latin and Greek, and we have preserved to us verses in these languages written by the Grotius of eight years. At the age of eleven he entered the University of Leiden, then in its nineteenth year, taking part in two public debates at the age of fourteen and graduating the same year. Already the mind of Grotius had turned toward international

events, and when, in 1598, Count Justin of Nassau and Grand Pensionary Barneveld left Holland to confer with Henry IV of France regarding the contemplated French-Spanish treaty, Hugo Grotius, a lad of fifteen years, accompanied them. The remarkable feature of this visit to France, during which Grotius took the degree of Doctor of Laws at the University of Orleans, is that the boy should have been able to withstand the flattering offers of the Court of France.

Saved by his sober judgment from this alluring life, Grotius returned to Holland to practice law. Undoubtedly it was his will alone which kept him at this work, for we have positive proof in his letters that the practice was distasteful to him. It robbed him, he said, of precious time he would have spent in studying and writing. Yet, in spite of his active work as a lawyer in The Hague, this young man found time to produce, in the winter of 1604-1605, the *De Jure Praedae*, the twelfth chapter of which was published in 1609 under the title of *Mare Liberum*.

From the time he entered the practice of law until 1621 Grotius' life was closely interwoven with the history of his country. He held the office of Attorney General of Holland, Zeeland, and West Friesland and became Pensionary of Rotterdam. When the great Gomarist-Arminian controversy arose he threw himself, with Barneveld and others, on the side of the latter, though always working to enlighten the people in the distinction between a true religious controversy and theological quibbling. And when this theological controversy entered as a wedge into the political breach already there, we find Grotius defending the constitution against the incursions of Prince Maurice.

As to the result, suffice it to say that he was arrested and sentenced to perpetual imprisonment in the ancient fortress of Loevestein, with all his estates and property confiscated. On March 22, 1621, he escaped in the now famous book-chest and fled to Antwerp, thence proceeding to Paris. In this city Grotius passed the greater part of fourteen years, studying and writing upon the problems of the world of that day. It was in Paris, 1625, that the *De Jure Belli ac Pacis*, one of the greatest works of all time, first saw the darkness of those troublous years.

In the meantime the Thirty Years' War had descended upon Europe, and the armies had overrun and devastated its fields and

owns. Gustavus Adolphus had entered the contest, to defeat the great Wallenstein at Lützen, November 16, 1632, but to die upon that field. To this brave Swedish king the learning of Grotius had stood out as a star of the first magnitude, and, sometime before his death, he had given orders that, should he die before he could carry out the plan himself, Grotius should be employed in the service of Sweden. Accordingly, Oxenstiern, the High Chancellor of Sweden, and Grotius met at Frankfort-on-the-Main in May, 1634. Together they traveled to Mainz, and there the exiled Hollander was appointed Counselor to the Queen of Sweden and her Ambassador to the Court of France.

Setting out from Mainz on the 8th of January, 1635,¹ when the roads were frozen and muddy in turn, Grotius was forced to make extensive detours in order to avoid encountering parties of the enemy. His progress was, therefore, necessarily slow, and he arrived at Metz on the 25th of January, much later than he expected and suffering from a severe cold. Five days later he wrote to Oxenstiern that he hoped to be able to leave Metz in a few days, and that he was suffering more in mind than in body, because of his restless desire to be again on his journey. His departure took place on the 2d of February, and on the 7th he passed through Meaux on the way to St. Denis. Arriving at this place, where his friend, Francis de Thou, hearing of his presence, hastened to meet him, he was compelled to tarry for some time because of the delay of the French Court in appointing a day for his formal reception.² The cause of this delay is not altogether certain; but, judging by the questions asked by Count Brulon on February 23, as to who had sent him into France and as to the nature of Oxenstiern's powers, it is to be inferred that the Court of France hesitated to recognize an ambassador not appointed by the Queen.³ In fact, it was not until the 28th of January, 1636, that the appointment given by Oxenstiern was ratified by the five Regents of the Kingdom in the name of young Queen Christina.⁴

Nevertheless, on Friday the 2d of March, 1635, Grotius made his public entry into Paris, attended by Marshal d'Estrées and Count

¹ Cattenburgh's *Vervolg der Historie van het leven des heeren Huig de Groot* — Bk. I, p. 10.

² Burigny's *Vie de Grotius*, I, pp. 217-218.

³ *Ep.* 364, p. 132.

⁴ Cattenburgh's *Vervolg*, Bk. II, pp. 60-61.

Brulon, the latter acting in the place of Marshal St. Luc, who was ill. They came in the coaches of the King and Queen to escort the Ambassador into the city, and the coaches of the Venetian, Swiss and Mantuan Ministers were also in the procession, together with those of the German Powers allied to Sweden. The princes of the blood did not send their coaches, since they were not in Paris, Gaston, Duke of Orleans, being at Angers, the Prince de Condé at Rouen, and the Count de Soissons at Senlis with the Court.⁵

On the 6th of March Grotius was conducted to the Court, sitting at Senlis, by the Duke de Mercœur, later Duke de Vendome and Cardinal, whom Grotius calls the most learned of all princes.⁶ At the reception the King's guards were under arms, and the King spoke so graciously to him that Grotius began to hope that he might be successful in his mission. By all the princes and their wives the Ambassador was equally well received, and, on March 8th, he sent Queen Christina news of his entry and of his audience with the King.⁷ It seems, however, that Paaw, the Ambassador of Holland to France, was somewhat embarrassed, being in doubt as to how he should treat his former countryman; but the instructions which were sent to him at his request directed him to act toward Grotius as he would toward any other minister of a Power friendly to Holland.⁸

With Richelieu the business was more serious. There were undoubtedly occasions when the Cardinal could ill afford to be overcordial, and, before he granted Grotius an interview, he desired to learn the nature of the latter's instructions regarding the treaty lately made between France and the German Princes, with which the Swedes had been dissatisfied. Following the battle of Nördlingen, in 1634, James Laeffer and Philip Strecht were sent by the Protestant Princes and States of the Circles and the Electoral Provinces of Franconia, Suabia, and the Rhine, to Paris to solicit the aid of France in the war against Austria. They accepted an offer by the Cardinal of 500,000 livres and 6000 foot in six weeks, the force of foot to be increased to 12,000 when France should, with the aid of the Allies, have obtained possession of Benfeld; but they failed to stipulate that France should

⁵ Burigny's *Vie de Grotius*, I, pp. 221-222.

⁶ *Ibid.*, p. 223; *Ep.* 339, p. 851.

⁷ *Ep.* 367, p. 134.

⁸ Burigny's *Vie de Grotius*, I, p. 222.

also continue to pay the subsidies which she had already pledged to Gustavus by the treaty renewed at Hailbron.⁹ After signing the new treaty, Laefler and Strext returned to Germany; but, when a motion to ratify their act was made in the Assembly of the Allies at Worms, the High Chancellor of Sweden opposed it on the grounds that it conflicted with the previous treaty, and declared that he would send an ambassador to France to settle the matter.¹⁰ This burden was placed upon Grotius, a burden which weighed more heavily because of the determination of the Cardinal that the results of his negotiations with the envoys of the German Princes should not be disturbed.

With this object in view, Richelieu decided to leave the first discussion of the matter to Boutillier, Superintendent of the Finances. Accordingly, Grotius met Boutillier and a colleague of the latter, Father Joseph, in the garden of the Tuileries, which he reached through the Convent of the Capuchins. Grotius not only maintained that the treaty could not be regarded as being in force till it had been ratified by Sweden, but he also declared that it could not be ratified because it would render nugatory the Treaty of Hailbron. To this Father Joseph replied that the Ministers of the German Princes had been invested with full powers to treat and that the agreement had been signed at Paris without any stipulation concerning the necessity of ratification. The Swedish Ambassador, however, answered that the High Chancellor and even the towns which approved the treaty all insisted upon the necessity of ratification.¹¹

Finding that Grotius was immovable in the stand he had taken, the French Ministers became angry and threatened not only to complain to Oxenstiern of his conduct, but also to advise Louis XIII to cease to regard him as an ambassador, but all without effect. They then said that the King would consent to the Swedes having command of the forces of France in Germany, although the treaty gave this command to a Prince; and when this concession was rejected, Father Joseph left in a rage. Grotius then continued the negotiations with the calmer Superintendent, and contended that while France might give subsidies to the Germans if she chose, it was only just and fair that

⁹ Burigny's *Vie de Grotius*, I, pp. 224-225.

¹⁰ *Ibid.*, I, p. 226.

¹¹ *Ibid.*, I, pp. 226-227.

those promised to Sweden, and on the strength of which the latter was fighting partly for France, should also be paid.¹²

On the 28th of March Richelieu sent for Grotius. The fact that the latter immediately waited upon him¹³ shows that the statement of du Maurier, that Grotius, while Ambassador from Sweden, never saw the Cardinal, is, to say the least, inaccurate. At this conference, in which the unratified treaty was the chief subject of discussion, Richelieu argued that the King had aided the Swedes enough by supplying the Germans with men and money, while Grotius maintained that Laeffer and Strecht were not authorized to make a treaty so contrary to the interests of Sweden. Father Joseph, who was again present, stated that the King had been informed that Grotius was the one who had persuaded the High Chancellor to refuse to ratify the treaty, an accusation which Grotius denied. The Cardinal hinted that Sweden could not expect the subsidy of a million in the future, and Father Joseph, pretending that Oxenstiern only objected to the command going out of Swedish hands into those of a Prince, intimated that the King would consent to this alteration. But Grotius insisted that the Treaty of Hailbron be strictly adhered to and the deadlock continued.¹⁴

At this point Oxenstiern announced that he was coming to Paris to settle all difficulties in a conference. The King ordered the Hotel for Ambassadors Extraordinary at Paris to be prepared for him, and, all discussions being suspended, went to Compiégne to meet him. Grotius, however, in consequence of a special message received by a courier, joined the High Chancellor at Soissons, and accompanied him to Compiégne.¹⁵ Oxenstiern, who had 200 men in his retinue, was met by the Count d'Alais, son of the Duke d'Angoulême, and Count Brulon in the King's coach, the Count de Soissons, who had been first designated, being absent.¹⁶

It was the 26th of April, 1635, that Oxenstiern arrived at Compiégne, and on the next day he had an audience with the King which lasted half an hour and at which Grotius was present. On the 29th of the

¹² Burigny's *Vie de Grotius* I, p. 229. ¹³ *Ep.* 380, p. 139.

¹⁴ Burigny's *Vie de Grotius*, I, pp. 230-232.

¹⁵ *Ep.* 393, p. 143, and *Ep.* 396, p. 144.

¹⁶ Burigny's *Vie de Grotius*, I, pp. 232-233.

month the Cardinal returned Oxenstiern's visit, but the High Chancellor, foreseeing that a discussion of the Treaties of Paris and Hailbron would produce bad feeling, did not mention them and spoke only of the old treaty between France and Sweden. He consented that this treaty might be slightly altered, and induced Richelieu to agree that no peace or truce should be concluded with Austria without mutual consent.¹⁷

The next day, Monday the 30th of April, Oxenstiern left Compiègne for Paris to reside incognito with Grotius,¹⁸ but the crowds in Paris, clamoring to see him, were so great that they could scarcely be kept out of Grotius' home. The High Chancellor remained in Paris only two or three days, visiting the Louvre, Notre Dame, and the Palais du Luxembourg, and then, after taking leave of the King, from whom he received a diamond ring worth ten or twelve thousand crowns and a miniature of the King in a box set with diamonds, and after tactfully giving Madame de Groot a present, he proceeded, accompanied part way by Grotius, to Dieppe, whence he embarked for Holland.¹⁹

The treaty of Compiègne gave rise to a dispute between Oxenstiern and the Duke of Weimar,²⁰ to whom the Marquis de Feuquières hinted that the High Chancellor, in making his last agreement with France, had shown no regard for the interests of Germany. Although this insinuation had little or no foundation, it is not at all unlikely that Feuquières made it at the instigation of the Cardinal, who desired to gain the confidence of the Duke, while depriving the Chancellor of it. Meanwhile, Richelieu was still clinging to the Treaty of Paris, and Avaugour, the French Ambassador to Sweden, was instructed to demand its ratification. The Swedish Government replied that Laefler and Streect were not sent out by Sweden, and referred the matter to Oxenstiern. Being thus thwarted in his attempts to secure the ratification of the Treaty of Paris, the French Ambassador was forced to confine his efforts to the ratification of the agreement of Compiègne.²¹

The change in the fortunes of Grotius also brought a change to the minds of the Ministers of Charenton — Faucheur, Mestrezat, and Daille — who had refused to admit him to their communion when

¹⁷ Burigny's *Vie de Grotius*, I. pp. 234-235.

¹⁸ *Ep.* 400. p. 146.

¹⁹ Burigny's *Vie de Grotius*, I. pp. 235-236; *Ep.* 344. p. 853.

²¹ *Ep.* 432. p. 159.

²² Burigny's *Vie de Grotius*, I. p. 237.

he had resided in Paris as an exile from Holland. The Ambassador from Sweden to the Court of Louis XIII was, however, a different man in the eyes of the Church, and on the 2d of August, 1635, the Ministers came to ask Grotius to join their communion.²² In so doing they expressed the hope that he looked upon their confession of faith as consistent with Christianity, since they had read his work on *THE TRUTH OF THE CHRISTIAN RELIGION* and approved it. On the 23d of August, Grotius, who had not yet gone to Charenton, writing to his brother, said: "I deliberate in order that I may do only what is agreeable to God, of service to the Church, and advantageous to my family."²³ But the Ministers eventually relieved his perplexities by deciding that, although they would be very glad to receive him as a citizen, they could not receive him as Ambassador from Sweden, since they disagreed with the religious doctrines adopted by that country. Grotius, therefore, resolved to worship thereafter at home, where his services were attended by Lutherans, as though he had publicly professed their religion. On December 28, 1635, he wrote to his brother, "We celebrated the festival of Christmas at home, the Duke of Würtemberg, the Count of Swartzenbourg, and several Swedish and German noblemen being there."²⁴ Grotius at first had as chaplain a Lutheran minister, Brandanus, who, despite instructions to the contrary, was prone to criticize both the Catholic and the Reformed Churches, so that Grotius at last, in the autumn of 1637, forbade him the use of the chapel, although keeping him in his home until the end of the following February. After that Grotius secured the services of an Arminian, Francis Dor, whose opinions in general very happily coincided with his own.²⁵

In the diplomatic world important events were taking place. Soon after Oxenstiern left France, the Peace of Vervins was broken and the French and Spaniards began the long war which was not to end until the Peace of the Pyrenees in 1659. When war was declared, the King of France and the Cardinal went to Château-Thierry. Grotius arrived at the Court on the eve of Whitsuntide, 1635.²⁶ As the result of the

²² *Ep.* 350, p. 854.

²³ Burigny's *Vie de Grotius*, I, p. 240; *Ep.* 354, p. 856.

²⁴ *Ep.* 363, p. 858.

²⁵ Burigny's *Vie de Grotius*, I, pp. 242-243.

²⁶ *Ibid.*, I, p. 243.

victories of Marshals de Brézé and de Chatillon over Prince Thomas of Savoy and of Marshal de la Force in Lorraine, the hopes and spirits of France were soaring high. Grotius, the Cardinal being at the moment indisposed, spoke to the Superintendent, Boutillier, and to the King about the payment of the subsidies, but without result. A little later he brought the matter to the attention of Richelieu, but the latter put him off until the return of Chavigny, the Secretary of Foreign Affairs, and Grotius returned to Paris.²⁷

The interview with Chavigny was difficult to obtain, the latter advancing every possible excuse for delay. However, Grotius pressed him constantly, and a meeting at length took place. Chavigny insisted, in reply to Grotius' demands, that he had only promised to help Sweden as far as he could, and that he intended to keep his word. Subsequently Servien, the Secretary of War, and the Cardinal both received Grotius most politely, but, while admitting the obligation of France, pleaded that her expenses were so great that delay was inevitable. Finally, although Father Joseph promised to use his endeavors to see that the money was paid, Grotius advised Oxenstiern to write to the King himself.²⁸ In the meantime, Bullion promised to pay 200,000 francs, but never issued the order; and Richelieu, in September, 1635, fearful lest the High Chancellor might conclude with the Elector of Saxony a treaty detrimental to France, promised that the Marquis de St. Chaumont should be sent to Sweden with power to act with Oxenstiern in the common cause, and referred Grotius to Bullion in regard to the subsidies.²⁹ Bullion, who was at Ruel, promised to pay at once only 200,000 francs and to raise the amount to 500,000 as soon as the King's affairs would permit. Meanwhile, St. Chaumont, a Catholic chosen to appease the Pope, was sent to Sweden without consulting Grotius, and on November 3, 1635, the latter found Richelieu at Ruel in a very bad mood, accusing Sweden of negotiating for a separate peace. On November 5th Grotius saw the King, and on December 14th went again to Ruel,³⁰ where he received, through a courier sent by St. Chaumont, some letters from Oxenstiern which he suspected had been opened. Subsequently Bullion and Servien assured him that 200,000

²⁷ Burigny's *Vie de Grotius*, I, pp. 243-245.

²⁸ *Ibid.*, I, pp. 248-251.

²⁹ *Ibid.*, I, pp. 245-248.

³⁰ *Ep.* 528, p. 204.

francs had already been ordered to be paid and that the remaining 300,000, which had been promised, should be turned over without delay.²¹

In the beginning of the year 1636 the Cardinal accused Grotius of circulating reports about the deplorable condition of affairs in France. Grotius restored his composure by explaining that the circulation of the reports was due not to any act of his, but to the efforts of Paaw and Aersens and the newspapers of Brussels.²² Moreover, the confirmation of Grotius' appointment to the ambassadorship, the confidence which Oxenstiern placed in him, and the friendship of the Prince of Orange gradually had their effect on the attitude of the French Court and of Cardinal Richelieu in particular, and in May, 1636, the change became very apparent. At that time we find the Cardinal congratulating Grotius that part of the subsidies had been paid and complimenting him and the High Chancellor upon the way in which Sweden had prospered despite the desertion of her friends and allies. Richelieu also spoke of the gain that might be derived from an alliance with England, suggesting that, with her aid, France and Sweden might obtain the restoration of the Palatinate to Prince Charles Louis, the nephew of the English King.²³ This was the last interview Grotius ever had with the great Cardinal, who did so much to strengthen France internally and externally during the reign of Louis XIII.

The ambassadors from the Protestant countries had for some time thought that it was beneath their dignity to allow a cardinal to take the upper hand of them, since it might be interpreted as an acknowledgment of the Pope's authority. Lord Scudamore, the ordinary ambassador from England, and the Earl of Leicester, Ambassador Extraordinary, were the first to raise the issue, and we find Grotius writing to the High Chancellor, "I commend those who uphold their rights, yet I do not dare to imitate them without orders."²⁴ Later, however, having received no instructions to the contrary, Grotius also broke off his visits to the Cardinal; and his course met with the approval of the Queen's Ministry, although it was considered somewhat as a slight by France.

²¹ Burigny's *Vie de Grotius*, I, pp. 251-255.

²² *Ibid.*, I, pp. 258-260.

²³ *Ibid.*, I, pp. 255-256.

²⁴ *Ep.* 598, p. 239.

That Grotius was unpopular in some quarters is not to be denied, and at this time he was disturbed by attempts to have him recalled. St. Chaumont, the Minister to Sweden, Paaw, the Dutch Ambassador at Paris, and Father Joseph, the most trusted diplomatist of Richelieu, were particularly active in this direction, and the matter proceeded so far that a request for his recall was sent to Oxenstiern. But the High Chancellor, realizing the worth of his ambassador, and the fact that his unpopularity was due to his earnest work for the Queen, refused to listen to the complaints. A public declaration by Father Joseph that the French Ministers desired his removal because he was opposing the success and welfare of France, fared no better. The High Chancellor wisely decided that Grotius should remain in Paris as ambassador, and not merely as an agent, as Grotius had himself suggested.³⁵

The chief difficulty seems to have been that Grotius was too honest to be popular in the world of diplomacy of that day. The presents welcomed by other diplomatists he refused to accept; the influences that succeeded with other ambassadors he firmly repelled.³⁶ This incorruptible attitude he steadfastly maintained, even when he was most perplexed in regard to his finances. On September 14, 1635, he wrote to Oxenstiern that the Treasurer of Sweden had neglected to pay his salary for the last quarter, and again, on November 8th, that he had received but one quarter's salary, which was owing before his arrival in Paris, and that two others were then due. By the end of 1638 six quarters were in arrears, while by the end of May, 1639, there was due him 40,000 francs, or \$8000, being two years' full salary at 20,000 francs a year. Salvius now ordered that half of this should be paid out of the subsidies from France, but the money was slow in coming in and Grotius was forced to tell Salvius that he would ask to be recalled if not paid.³⁷ It was at this time that Grotius was offered a pension by the French Ministry, which he promptly refused. Finally, on the 21st of January, 1640,³⁸ he wrote to the Queen of Sweden for permission to take his salary from the subsidies he was obtaining, and, without awaiting a reply, appropriated 16,000 thalers. This, as he

³⁵ Burigny's *Vie de Grotius*, I, pp. 263-266.

³⁶ Burigny's *Vie de Grotius*, I, pp. 272-273.

³⁷ *Ep.* 958, p. 428.

³⁸ *Ep.* 1308, p. 592.

advised Oxenstiern,³⁹ his necessities compelled him to do. Besides, he was only following the precedent established by his predecessors.

Meanwhile, the first effort for peace in Europe was made. In 1636 Pope Urban VIII, seeing that the success of the Swedes in the war would prejudice the Roman Catholic religion in Germany, made a move for peace and called a conference at Cologne, with Cardinal Ginetti as mediator.⁴⁰ Grotius was of the opinion that the Swedes ought not to accept the Pope's mediation or to send representatives to Cologne. In this view he had the support of Lord Scudamore,⁴¹ the English Ambassador, who concurred with him in thinking that the Protestants would suffer in a conference over which the Pope's delegate presided. Although the other diplomatists at Paris, and particularly the French and Venetian, realizing that the conference could not take place unless Sweden was represented, urged Grotius to attend, the Swedes stood firm and the Congress at Cologne never took place. It is interesting to note that Grotius was advised by Godefroy, one of the legates of France to the conference, not to attend. This fact justifies a doubt whether Richelieu, under whose orders Godefroy acted, really desired a peace at that time.⁴² It is reasonable to suppose that the Cardinal's foreign policy had not progressed to the point where he considered peace to be expedient. Sometime later the Republic of Venice, acting in conjunction with the Pope, sought to bring about a European peace. To this move the Queen of Sweden yielded her sanction, on condition that the Republic give her the honors due her as Queen and address her as "Most Serene and Most Powerful" instead of simply "Most Serene." The negotiations proceeded very satisfactorily between Grotius and Cornaro, the Venetian Minister, after they had arranged certain petty differences over their diplomatic positions and relations.⁴³

In the era of which we write, questions of etiquette and precedence were deemed to be matters of the first importance; and, early in 1637, there occurred in France a very pretty diplomatic quarrel. Paaw, the Dutch Ambassador to France, having been recalled, his place was

³⁹ *Ep.* 1350, p. 612; April 14, 1640.

⁴¹ *Ep.* 690, p. 284.

⁴² *Ibid.*, I, pp. 279-281.

⁴⁰ Burigny's *Vie de Grotius*, I, p. 275.

⁴¹ Burigny's *Vie de Grotius*, I, p. 277.

taken by Oosterwyk, former ambassador of the United Provinces to Venice,⁴⁴ who, as he had been very intimate with Grotius, was desirous of renewing their friendship now that they were to be members of the diplomatic corps in the same city. He accordingly asked Grotius to send his coach to his public entry. This Grotius did, but the ambassadors ordinary and extraordinary of England also sent their coaches, and a quarrel as to precedence ensued, in which swords were drawn. There seems indeed to have been a general confusion of coaches, horses, servants, and diplomatists until Marshal de la Force, who was escorting the Dutch Ambassador, and who seems to have felt the responsibility of getting the Ministers safely back to Paris, settled the dispute by declaring that the question had been decided in the reign of Henry III in favor of the English. To this decision the Swedes submitted, and the coaches of the two ambassadors ordinary, Grotius and Lord Scudamore, were withdrawn, thus giving precedence to that of the ambassador extraordinary of England, the Earl of Leicester. The quarrel was, however, taken up by the *Gazette of France*, with which Grotius found fault because it mentioned England before Sweden. On this question a conference took place between Leicester and Grotius, in which Leicester claimed that the precedency of Sweden over England was unheard of, while Grotius answered that *his* contention found support in the proceedings of the Council of Basel (1431-1449). Leicester further insisted that England had been converted to Christianity before Sweden, to which Grotius cleverly replied that this was a very bad reason whose employment might hinder the Pagans and Mahometans from becoming Christians.⁴⁵ The affair had no serious consequences, and was dropped after the ambassadors had exhausted their stock of reasons and probably themselves. As an evidence that the quarrel never became so serious as to affect personal relations, we have the fact that Madame de Groot stood as godmother at the christening of Lord Scudamore's child in March, 1638, which was during the height of the dispute.⁴⁶

The last years of Grotius' embassy were, with the exception of a few incidents of importance, comparatively uneventful. As has been

⁴⁴ Burigny's *Vie de Grotius*, I, pp. 281-282.

⁴⁵ *Ibid.*, I, pp. 283-285.

⁴⁶ *Ibid.*, I, p. 287; *Ep.* 919, p. 406.

remarked, Grotius had resolved not to confer with the Cardinal again, but to treat instead directly with the King. Accordingly, on the 22d of November, 1636, just after His Majesty's return from the campaign of that year, the Swedish Ambassador called to congratulate him on his success, and again on the 23d of February, 1637, came to felicitate him on his reconciliation with Gaston of France and the restoration of union and peace in the royal family.⁴⁷

When, in August, 1637, the King went to Chantilly, Grotius went thither to suggest to the King that he send a reinforcement to the Duke of Weimar, who had crossed the Rhine and was attempting to keep the German allies of France and Sweden from joining the enemy.⁴⁸ The King promised to send the duke as many men as he could spare. Again on September 23d,⁴⁹ Grotius sought the King in order to deliver to him a letter from the Queen of Sweden and to acquaint him with the gallant stand Marshal Bannier was making against five armies in the field. Grotius added, however, that the marshal was incapable of holding out much longer without assistance and urged that prompt reinforcements would swing many towns, then wavering under the pressure of Austria, back into the Protestant column.⁵⁰ At St. Germain on October 1, 1637, Grotius renewed his solicitation of aid from Louis, presenting a letter from Christina, dated August 19, 1637, and pointing out that, if the Austrians succeeded in defeating the Swedes, they would next overpower the Duchess of Savoy, the King's sister, and invade France. To Grotius the King gave assurances that he was then sending aid, and promised more in the future.⁵¹

The Duke of Weimar, on the 2d of March, brilliantly opened the campaign of 1638 by a signal victory over the Austrians, capturing all their generals, including the celebrated John de Vert, whose name had become a terror to the French. The King, upon receiving this good news, immediately notified Grotius, saying that he knew of no one to whose ears it would be more welcome — for which honor Grotius thanked Louis in an audience of March 16th.⁵²

⁴⁷ Burigny's *Vie de Grotius*, II, pp. 1-2; *Ep.* 688, p. 281 and *Ep.* 719, p. 303.

⁴⁸ *Ep.* 813, p. 354.

⁴⁹ *Ep.* 327, p. 363.

⁵⁰ Burigny's *Vie de Grotius*, II, pp. 3-7.

⁵¹ *Ibid.*, II, pp. 7-8.

⁵² *Ibid.*, II, pp. 8-9; *Ep.* 926, p. 410.

On the 19th of April, 1638, Grotius again besought the King for aid, and informed him that Queen Christina would assent to the proposed mediation of the Venetians if she were addressed properly, since a long truce might lead to peace. With this in view, the Queen gave her ambassador in France full power to draw up a plan of a truce in concert with the King's Ministers. Louis told Grotius that the Count de Guébriant was already on the march to join the Duke of Weimar, that he would send more troops in the near future, and that he would nominate Chavigny to confer with Grotius on the question of a truce.⁵³

In the beginning of June, 1638, Grotius again saw the King at St. Germain, requesting him once more to send reinforcements and to procure the release of Marshal Horn, the Swedish commander, who had been captured in the battle of Nördlingen, by exchanging one of the enemy's generals for him. The King answered, however, that John de Vert was the only man for whom the Austrians would make the exchange and that de Vert was the prisoner of the Duke of Weimar,⁵⁴ though Chavigny informed Grotius several days later that de Vert was really the prisoner of Louis.⁵⁵

Meanwhile, the Pope, perceiving that peace without his intervention was still very much a matter of the future, proposed a truce, and Grotius and Chavigny met on April 27, 1638, to discuss a plan for it.⁵⁶ The latter said he had learned from Schmalz, the secretary of the High Chancellor, who had just arrived from Sweden with instructions for Grotius, that the Swedes expected the same subsidies during the truce that they had received through the war and that he thought this claim unreasonable. To this Grotius answered that the truce could be maintained only by keeping large armies in the field; that this would be a great expense, and that, during the Twelve Years' Truce (1609-1621), between the Spaniards and the Dutch, the King, following the example of his father, Henry IV, gave the Dutch the same assistance he had rendered during the war. Finally it was decided that Chavigny should consult with Richelieu, and Grotius with Schmalz, and that they should confer again in the near future.⁵⁷

⁵³ *Ep.* 949, p. 421; Burigny's *Vie de Grotius*, II, pp. 9-11.

⁵⁴ *Ibid.*, II, pp. 14-15.

⁵⁵ *Ep.* 971, p. 435.

⁵⁶ *Ep.* 950, p. 421.

⁵⁷ Burigny's *Vie de Grotius*, II, pp. 17-19.

The next meeting took place at Chavigny's house on the 1st of May, when Chavigny informed Grotius that he would lay any proposal of the Swedes before the Cardinal. Two demands were then put in writing by Grotius, first, that the subsidies should remain the same during the truce as they had been during the war, and second, that the Swedes should not only keep the part of Pomerania which they held, but that the rest should be ceded to them. These proposals Chavigny promised to submit to the Cardinal.⁵⁸

On May 18th, Chavigny waited upon Grotius in order to resume the discussion.⁵⁹ The French Minister declared that the King could not continue the subsidies, but would give 300,000 florins a year to the Swedes during the truce. Grotius declined to consent to a diminution of the former subsidies. As to Pomerania, Chavigny argued that the King could not demand the rest of that country from the enemy, and the conference ended by Chavigny promising to communicate the King's wishes to Grotius in writing.⁶⁰

In the meantime Schmalz, jealous of Grotius' position, had done all that was possible to hurt him. He wrote to the Court of Sweden that they could no longer refuse to recall Grotius. To this act he was moved by the flattery borne to him by Count de Feuquières from the Cardinal, who, realizing that France had found a tool, assured Schmalz that Paris was extremely well pleased with him and that he would solicit his stay in France. To Chavigny, Schmalz declared that Sweden had resolved to be content with much smaller subsidies, and offered to prove this by letters.⁶¹

Chavigny being indisposed, Desnoyers, Secretary of War, was appointed to confer with Grotius; and he informed the latter that, as regarded the truce, everything had been settled between the Cardinal and Schmalz. Grotius, before answering, insisted upon seeing Schmalz, with whom he was willing to work in the interest of Sweden. Schmalz declared that he had settled nothing, but stated that he had full powers to act independently of Grotius in every affair of the embassy and advocated the acceptance of a subsidy of 200,000 florins during the truce.⁶² When Grotius doubted this statement, Schmalz be-

⁵⁸ Burigny's *Vie de Grotius*, II, pp. 19-20.

⁶⁰ Burigny's *Vie de Grotius*, II, pp. 20-21.

⁶² *Ibid.*, II, pp. 22-23.

⁵⁹ *Ep.* 960, p. 428.

⁶¹ *Ibid.*, II, pp. 21-22.

came so insolent that Grotius wrote to the High Chancellor that one or the other should have exclusive power; and he later said: "I beg your Sublimity, that, if I can be of any use to you, you would be pleased to protect me, as you have done heretofore. In all I have done I have had nothing in view but the welfare of Sweden, and it has cost me much labor to raise up, by deeds and words, a nation little known in this country. If I cannot serve usefully, I would much rather return to the state of a private man than be a burden to the Kingdom and a dishonor to myself."⁵³

Surely it was no easy task that Grotius had performed for Sweden. To a sensitive nature, such as his was, and with a delicate conscience, such as he had, many moments of those years must have been torture. His association with Schmalz was in every way burdensome. This worthy took up his residence with a Swede named Crusius, whom Grotius had presented to the King in July, 1638.⁵⁴ One day the two friends appeared intoxicated at Grotius' house, and insulted Madame de Groot by fighting and using offensive language before her. This and other misconduct on the part of Schmalz Grotius forgave, in order that personal differences might not impair their ability to coöperate for the good of Sweden; and he even used his influence to calm Baron d'Erlach, attaché to the Duke of Weimar, who was enraged at Schmalz's abuse of the duke.⁵⁵ In the end Schmalz finally returned to Sweden, richer than he had left, and embraced the Catholic religion. He was soon imprisoned for his misdeeds, but had the good fortune to escape, taking refuge in Germany where he entered the service of the Emperor.⁵⁶

An incident connected with the introduction of Crusius to Louis XIII is perhaps worth mentioning. On their return from the audience Grotius and Crusius passed through a village where a large crowd had assembled to witness the execution of some robbers. One of the mounted servants of the ambassador, in order to make the throng give way for his master's coach, struck some of the people with his whip. The alarm immediately went out that the occupants of the coach were friends of the prisoners who had come to rescue them, and in conse-

⁵³ Burigny's *Vie de Grotius*, II, pp. 23-24; *Ep.* 982, p. 444.

⁵⁴ *Ep.* 988, p. 447.

⁵⁵ Burigny's *Vie de Grotius*, II, pp. 24-25.

⁵⁶ *Ep.* 1040, p. 472; Burigny's *Vie de Grotius*, II, pp. 25-26.

quence shots were fired at the coach, with the result that the coachman received wounds of which he died some days later. Bullets passed within a few inches of Grotius' head, but he was unharmed, and the tumult ceased when his presence became known.⁶⁷ The King, when informed of the incident, sent Counts Brulon and Berlise, the Introducers of Ambassadors, to apologize for it and to promise that the offenders would be punished when caught. Seven or eight of the inhabitants of the village where the crime was committed were arrested, tried, and convicted, but Grotius obtained a pardon for them, thus preserving to them not only their lives but also their goods, the forfeiture of which had been decreed.⁶⁸

But to return to the truce. The negotiations, which had failed at Paris, were transferred to Hamburg to be carried on between the Count d'Avaux and Salvius, but only to meet the same fate. A truce was little desired by the French, the Swedes, or even the Imperialists, and mutually acceptable conditions could not be arranged. Plainly the time was not yet ripe for it.⁶⁹

On October 1, 1638, Grotius had an audience with the King, at which, after congratulating Louis upon the recent birth of a son, he asked the King to send aid to the Duke of Weimar, who was about to be attacked by a vastly superior force.⁷⁰ Louis promised to strengthen the Duke's army as much as he could, but we find Grotius asking the same aid at another audience, on the 10th of November, 1638.⁷¹ On the 4th of December he waited upon the King and Queen to felicitate them, by order of the Queen of Sweden, upon the birth of the Dauphin. Grotius excused his Queen, on this occasion, for not having sent an ambassador extraordinary, on the ground that all the first lords of the country were employed in the army or in the Ministry, so that they could not well be spared for the long journey to Paris.⁷²

Toward the end of 1638 the fortress of Brisac surrendered to the Duke of Weimar, thus making Burgundy and Champaign more secure and strengthening the position of Alsace, Lorraine, and Switzerland.

⁶⁷ Burigny's *Vie de Grotius*, II, pp. 26-27; *Ep.* 988, p. 447; *Ep.* 991, p. 449.

⁶⁸ *Ibid.*, II, pp. 27-29.

⁶⁹ *Ibid.*, II, p. 26.

⁷⁰ *Ep.* 1038, p. 468.

⁷¹ *Ep.* 1064, p. 480.

⁷² Burigny's *Vie de Grotius*, II, pp. 29-32.

Grotius paid his compliments to the King and asked that the money promised to Sweden might be paid, so that Marshal Bannier should be enabled to advance more strongly, and the King assured Grotius that the money would be sent.⁷³ But in March, 1639, we find Grotius again before Louis, having obtained an audience only after an argument with Count Brulon.⁷⁴ It is possible that the delay of the King in sending aid to the Duke of Weimar was the result of Richelieu's influence. The great French statesman undoubtedly regarded the Duke as a dangerous factor and as a man who would bear watching. Moreover, the Cardinal had offered his niece to Weimar in marriage, and the Duke's refusal of this offer, together with his desire to keep Brisac, which Richelieu wanted, quite enraged the Cardinal. His resentment, however, was soon to be modified, for a violent fever seized the Duke at Neuenburg, and on July 10, 1639, after running a four days' course, consigned to the grave the prince whom Grotius called "the honor and the last resource of Germany."⁷⁵ At the time of his death it was thought by some that the Duke had died of poison, and that Grotius was among this number we know from a letter which he wrote to Chancellor Oxenstiern on October 10, 1639. "The more I reflect upon the death of the Duke of Weimar," said Grotius, "the more I am persuaded that he had on his body no marks of the plague, and that it was not in his house. So the rumors that he was poisoned again prevail and the suspicion falls upon the Geneva physician who was summoned to relieve his colic."⁷⁶

With the death of Weimar, Grotius lost a trusted and trusting friend and Sweden a commander of her armies and a ruler of her towns.

As soon as the Duke's death became known, Charles Louis, Elector of Palatine and son of the unfortunate King of Bohemia, proposed to have himself recognized as head of the Weimarian army.⁷⁷ Needing funds, the Elector went to his uncle, King Charles I, of England, from whom he obtained £25,000 sterling with a promise of more if needed; and he was also advised to work in concert with France, without whose

⁷³ Burigny's *Vie de Grotius*, II, pp. 33-34.

⁷⁴ *Ibid.*, II, p. 34.

⁷⁵ *Ep.* 1217, p. 549; *Ep.* 1224, p. 553. ⁷⁶ Burigny's *Vie de Grotius*, II, p. 36.

⁷⁷ *Ibid.*, II, pp. 38-51.

assistance his attempt would be useless. This Charles Louis agreed to do; but he was too impatient to wait for the passport for which Bellièvre, the French Ambassador in London, had written and which the Court of France, disliking his plan, was in no hurry to grant, and set out for France incognito. He was, however, too vain to keep his identity unknown, and, after embarking publicly under a salute, he landed at Boulogne, escorted by King Charles' ships, which saluted him again as he disembarked.

Upon landing, the Elector started for Paris with five servants, and, after changing his name, took the road to Lyons, where the King was. His intention was to turn off into Switzerland and thus join the army, but the Cardinal, knowing his whereabouts, allowed him to proceed as far as Moulins, where he had him arrested and confined in the citadel.⁷⁸ From thence Charles Louis was taken to Vincennes, where he was not permitted to write to any one or to receive any visitors, although, after six days, he was allowed to walk in the garden and after a month his two brothers, Maurice and Edward, were allowed to see him, though only in the presence of witnesses.⁷⁹

His imprisonment, as may be supposed, raised not a little stir in Europe. The Earl of Leicester, as English Ambassador to France, demanded his release, and the King of England wrote to the French King that he had sent his nephew into France to confer with the King, and that if the latter would not give him an audience, he ought to send him back to England.⁸⁰ These requests, however, had no effect, and Charles I applied to the Queen of Sweden to intercede for his nephew. Accordingly, Grotius was permitted to confer with the French Ministers, and he drew up a plan of compromise, by which the Elector was to declare, in writing, that he never had intended to obtain control of the Weimarian army without the consent of the Queen of Sweden, and was then to receive the freedom of Paris on his own and the Earl of Leicester's promise that he would not leave the city without the King's consent. In this affair the French Ministry had need of Grotius' services, and treated him with a deference hardly shown before. In January, 1640, Chavigny, by order of the King, assured him that the past

⁷⁸ *Ep.* 1271, p. 576.

⁷⁹ *Ep.* 1283, p. 581.

⁸⁰ *Ep.* 1291, p. 584; *Ep.* 1292, p. 585.

acts of which he had had reason to complain were the work of the deceased Father Joseph.

France was willing to agree to the terms of Grotius' compromise, but the Earl of Leicester, who had orders to demand the Elector's unconditional release, was obliged to write to the King for instructions. In the meantime the Cardinal decided that Charles Louis should follow the Court, for the reason that he might thus be more easily watched, and be less able to interfere with France's control of the Weimarian army. The Queen of Bohemia, the Elector's mother, approved of Grotius' plan, and the Queen of Sweden ordered her ambassador to request an audience of King Louis in order to present a letter from her to the same effect.²¹ On February 18, 1640,²² the audience, which an attack of gout, from which the King was said to have been suffering, had delayed, at last took place. Grotius urged that the Elector was young and impetuous, and that the best course was to forget what had occurred, since it had done no harm. His representations were, however, destined to do little good, for the Elector, pressed by Chavigny and unable to see Grotius, signed the declaration which the King desired, and was then conveyed incognito on the night of the thirteenth to the fourteenth of March, 1640, to the Earl of Leicester's house. A few months later France recognized Charles Louis as Elector and on July 25th, 1640, the King of France gave him complete freedom, subject only to the conditions he had signed, not to work against the interests of France. He accordingly set out for Holland, to remain there until the troubles with Scotland, which were to bring his uncle's head to the block, were over.

In the meantime, Grotius had been occupied with fresh negotiations for the exchange of Marshal Horn, the son-in-law of Chancellor Oxenstiern, who had been captured at Nördlingen. The famous John de Vert was at the same time a prisoner at Vincennes, but an exchange of these generals was blocked by two difficulties. In the first place, the Duke of Weimar had declared that John de Vert was his prisoner and that he had sent him into France only to be kept there at his orders; in the second place, the French Ministry were fearful lest Marshal Horn's return might be harmful to the common cause, since

²¹ Ep. 1319, p. 597.

²² Ep. 1327, p. 601.

it might occasion a dangerous split in the Allied forces.⁸³ In an audience with the King in the beginning of November, 1639, Grotius obtained Louis' promise to present the matter to the Ministry, after he had stated that, when the Duke of Weimar died, he had decided that John de Vert and Enkefort should be exchanged for Marshal Horn.⁸⁴ The Duke of Bavaria, who also had a claim to Horn, whom he had held as a prisoner, readily gave his consent to the exchange, and, in the beginning of September, 1640, just after the taking of Arras (a propitious time to approach the King), Grotius went to St. Germain to press the matter again. Not long afterwards Chavigny informed him that the King had consented to the exchange, provided the treaty between France and Sweden should be renewed; but the exchange was not executed, and Grotius sought an audience of the King at Rheims.⁸⁵ Here Louis promised positively that de Vert should have his liberty if the Duke of Bavaria should send Marshal Horn to Landau. Grotius so advised the Bavarian Court, de Vert was conducted to Selestad, and the exchange was at last made at Strasburg.⁸⁶

But the exchange of the two generals did not settle the question of the renewal of the French-Swedish treaty, which was soon to expire. This renewal was negotiated at Hamburg between Claude de Mèze, Count d'Avaux, and John Adler Salvius, Vice Chancellor of Sweden. Grotius was subordinate to the latter, but was able to render great service, since he was so well acquainted with the affairs of France that he knew how far Sweden might go in her demand for subsidies before France would turn. On the 29th of September, 1640, he wrote to the High Chancellor that he knew the Cardinal would increase the subsidies if pressed. Accordingly, when the treaty was signed at the end of June, 1641, instead of the annual subsidy of a million francs which France had promised to Sweden by the last treaty, Sweden was now to receive 1,200,000; and this, in spite of the repeated declarations of the King that the treaty could not be renewed on the former terms.⁸⁷

Cardinal Richelieu died in the year after the renewal of the treaty, passing away on the 4th of December, 1642.⁸⁸ Undoubtedly Grotius

⁸³ Burigny's *Vie de Grotius*, II, pp. 51-52.

⁸⁴ *Ibid.*, II, pp. 53-55.

⁸⁵ *Ibid.*, II, p. 56; *Ep.* 1420, p. 647.

⁸⁶ *Ibid.*, II, pp. 52-53.

⁸⁷ *Ibid.*, II, p. 55.

⁸⁸ *Ibid.*, II, p. 59.

mourned little over this loss to France; the two great men were too different in temperament, character, and ideals to work together, and consequently had been at sword's points ever since they were brought into contact with each other.

Louis XIII did not long survive his Prime Minister, breathing his last on the 14th of May, 1643. Anne of Austria, Regent during the minority of her son Louis XIV, informed Grotius through Chavigny, and repeated it herself, that the King's death would make no difference in the alliance between France and Sweden. Cardinal Mazarin, gaining the Queen's confidence, took up the reins of government where the grim warrior had caused Richelieu to lay them down, but Grotius refused to deal with him directly until so ordered by his Queen.⁸⁸

In the meantime the war had spread. Denmark had seized several Swedish ships trading in the Sound, and Sweden had declared war against the King of Denmark. In an audience in the middle of April, 1644, Grotius, without instructions, laid the causes of the conflict before the French Queen, showing her the declaration of war, which he translated into Latin and caused to be printed in Paris. Sometime later these acts of Grotius were in effect approved by the Queen of Sweden when she directed him to give to the Regent just the information he had imparted.⁸⁹

The man who brought to Grotius the letters of Queen Christina, directing him to explain the grievances of Sweden against Denmark, was the adventurer C  risante.⁹¹ He was the son of Duncan, Minister of Saumur, and, being a master of *belles-lettres*, had been appointed governor to the Marquis de Foix, who later made him Lieutenant-Colonel of the Regiment of Navarre. But a quarrel, at the beginning of the Regency of Anne of Austria, with the Duke of Candale, made it necessary for him to leave the kingdom, and he had retired into Sweden with the hope of gaining the favor of the Queen. In this he was not disappointed, for she gave him a commission to levy a regiment, which he never raised, and sent him into France with the titles of Colonel and Agent of Sweden.⁹²

When C  risante arrived in Paris he had orders to do nothing unless

⁸⁸ Burigny's *Vie de Grotius*, II, pp. 59-60.

⁸⁹ *Ibid.*, II, pp. 60-61.

⁹¹ *Ibid.*, II, p. 61.

⁹² *Ibid.*, II, p. 63; *M  moires du Duc de Guise*, II, p. 78.

in concert with Grotius,⁹³ but, relying upon the feeling which continued disputes between the Swedish Ambassador and the French Ministers had generated in Sweden, he set out to work against Grotius to his own personal profit. The reader may recall that Grotius once wrote to the High Chancellor that, in view of the difficulties attached to the Swedish Embassy in Paris, it might have been wise to keep him in Paris only as an agent.⁹⁴ This suggestion was rejected, but in the course of time the false reports that were constantly sent into Sweden by his enemies in France made an impression on the Ministry. Grotius knew that this was the case, and as he had not been consulted in the appointment of C  risante, he looked upon him as a spy sent by the Ministry to observe his conduct.⁹⁵ On November 1, 1641, he wrote to his brother, "If they threatened to recall me from my embassy I should not be sorry; there is little profit in this kind of employment. I am tired of honors; old age approaches and will soon require rest." ⁹⁶ A year later he wrote again, "I love quiet and would gladly devote the remainder of my life to the service of God and posterity. If I HAD NOT SOME HOPE OF CONTRIBUTING TO THE GENERAL PEACE, I SHOULD HAVE RETIRED BEFORE NOW."⁹⁷

The presence of a rash, selfish adventurer lording it over him was more than Grotius could bear, and at last, his patience exhausted, he wrote to Sweden asking that the Queen recall him. His request was readily granted.⁹⁸

Grotius now addressed himself to Baron Oxenstiern, son of the High Chancellor and Swedish Plenipotentiary at the Peace of M  nster and Osnabr  g, requesting advice as to where he should go and asking for safe conduct from the ambassadors of the King of Spain, the Emperor, and the Elector of Cologne. Queen Christina, in letters to the Queen of France and to Grotius, expressed her appreciation for the great services which he had rendered with fidelity and prudence.⁹⁹

While waiting for Baron Oxenstiern's reply, Grotius asked Spi-

⁹³ *Ep.* 716, p. 970.

⁹⁴ *Ep.* 690, p. 284.

⁹⁵ C  risante was later dismissed from the Queen's service because of his dishonorable acts, but not until after Grotius' departure from Paris.

⁹⁶ *Ep.* 572, p. 928.

⁹⁷ *Ep.* 620, p. 942.

⁹⁸ Burigny's *Vie de Grotius*, II, p. 64.

⁹⁹ *Ibid.*, II, pp. 64-65.

ringius, Swedish Agent in Holland, for a ship to convey him to Gottenburg, or, if he could not do that, to obtain for him a passport to go thither from Holland. He embarked at Dieppe for Holland, where he was received most kindly. With practically no opposition he was permitted to pass through the country, and the city of Amsterdam fitted out a vessel to carry him to Hamburg, where he arrived May 16, 1645, after a voyage of eight days with head winds.¹⁰⁰ On the next day Grotius set out for Lübeck, where he found many friends, and the end of March saw him at Wismar, where Count Wrangel, Admiral of the Swedish fleet, entertained him splendidly and sent him to Kalmar on a man-of-war.¹⁰¹

The High Chancellor was at Suderacher, about five miles from Kalmar, negotiating a peace between Sweden and Denmark. Upon receiving a letter from Grotius announcing his arrival, he sent, on the 8th of June, his coach to carry him to Suderacher, where he remained for a fortnight, honored by the Chancellor and the other ambassadors.¹⁰² Returning then to Kalmar, Grotius proceeded at once to Stockholm, where, on the day after his arrival, the Queen received him, having come from Upsala upon hearing of his approach. Several audiences and dinners with the Queen followed, and she several times refused to grant him his dismissal, insisting that he should bring his family into Sweden and remain in her service as Councillor of State.¹⁰³

But Grotius was resolved to leave. He asked for a passport, and, as this was delayed, decided to depart without one. However, he had only got to a seaport two miles away when a messenger from the Queen overtook him, saying that Christina wished to see him once more before he left. He accordingly returned to the Queen, who gave him 12,000 imperials and some silver plate, which she presented to him with his passport, explaining that the finishing of the plate had caused the delay in issuing the passport. On the 12th of August he embarked for Lübeck on a vessel furnished him by the Queen.¹⁰⁴

¹⁰⁰ Burigny's *Vie de Grotius*, II, pp. 67-68; *Ep.* 1760, p. 749.

¹⁰¹ *Ibid.*, II, p. 68; *Ep.* 1762, p. 749; *Ep.* 1763, p. 749.

¹⁰² *Ibid.*, II, pp. 68-69.

¹⁰³ *Ibid.*, II, pp. 69-70. Reference to Le Clerc, L, XII.

¹⁰⁴ *Vindie. Grot.*, p. 478; Burigny's *Vie de Grotius*, II, p. 70; Cattenburgh's *Vervolg van het leven van Huig de Groot*, Bk. X, p. 409.

It is uncertain what Grotius' plans were in embarking from Stockholm. Vondel, the Dutch poet, thought he intended to go to Osnabrug, where the Peace of Westphalia was in course of negotiation. Others thought he was returning to Holland, where the Republican party was growing stronger, or that he was going to Poland in the hope that the King would send him to France as ambassador. It seems highly probable that Grotius' steps were leading him to Münster and Osnabrug to interest himself in the great peace which was to end the last professedly religious war Europe has known. But after that? Perhaps, wearied of the intrigue of negotiations, he only sought a quiet retreat where he could devote the remainder of his life to his project for the union of all Christians into one tolerant body, and all nations into an harmonious civilization.

The vessel on which Grotius embarked had hardly cleared the port when it was overtaken by a terrible storm and was obliged to put in, on the 17th of August, fourteen miles from Danzig. Grotius set out in an open wagon for Lübeck and arrived at Rostock on the 26th of August, very ill. A physician, named Stochinan, was summoned, who said that Grotius was suffering from fatigue and that rest would restore his health, but the next day he was worse, being very weak and in a cold sweat. Grotius, thinking that his end was near, asked for a clergyman, and John Quistorpius was called, who, in a letter to Calovius, gives us an account of the last moments of the great man.¹⁰⁶ It reads as follows:

You are desirous of hearing from me how that Phoenix of Literature, Hugo Grotius, behaved in his last moments, and I shall gratify your wish. He embarked at Stockholm for Lübeck, and, after being tossed for three days by a violent storm, was shipwrecked and got to shore on the coast of Pomerania, whence he came to our town of Rostock, distant over sixty miles, in an open wagon, through wind and rain. He lodged with Balleman and sent for Stochman, the physician, who, observing that he was extremely weakened by years, by the shipwreck and the inconveniences of the journey, judged that he could not live long. The second day after the arrival of Grotius in this town, that is, on the eighteenth of August (old style), he sent for me about nine o'clock at night. I went, and found him almost in the throes of death. I said there was nothing I desired more than to have seen him in good health, that I might have the pleasure of his conversation. He replied that God had willed it thus. I told him to prepare himself for a happier

¹⁰⁶ Burigny's *Vie de Grotius*, II, p. 72.

life, to acknowledge that he was a sinner and to repent of his sins; and, having made mention of the Publican, who confessed that he was a sinner and asked God's mercy, he answered: "I am that Publican." I continued and told him that he must have recourse to Jesus Christ, without whom there is no salvation. He replied, "I have all my hope in Jesus Christ." I began to repeat aloud in German the prayer which begins, "Herr Jesu"; he followed me, in a very low voice with his hands clasped. When I had finished, I asked him if he had understood me. He answered, "I understand you very well." I continued to repeat to him those passages of the word of God which are usually recalled to the memory of the dying, and, asking him if he understood me, he answered, "I hear your voice well, but I understand with difficulty what you say." These were his last words. Soon after he expired, exactly at midnight.¹⁰⁶

Thus died this celebrated man, on the night of August 28 or the morning of August 29, 1645,¹⁰⁷ at the age of sixty-two.

After the vital organs were sealed in a copper casket and buried in the Cathedral of Rostock, to the left of the choir, the embalmed body was brought to Delft and there buried in the Nieuwe Kerk, October 3, 1645, where it now rests, beside the bodies of the Princes of Orange.¹⁰⁸

He had written this epitaph for himself:

"Grotius hic Hugo est, Batavum captivus et exul,
Legatus Regni, Suecia magna, tui."¹⁰⁹

HAMILTON VREELAND, JR.

¹⁰⁶ Burigny's *Vie de Grotius*, II, pp. 73-74. See *Ep. Eccles. et Theol.*, 583, p. 828.

¹⁰⁷ Cattenburgh's *Vernolg van het leren van Huig de Groot*, Bk. X, p. 412. Burigny's *Vie de Grotius*, II, p. 74.

¹⁰⁸ Cattenburgh's *Vernolg van het leren van Huig de Groot*, Bk. X, pp. 412-415; Fruin's *Huig de Groot en Maria van Reigersbergh*, *Verspreide Geschriften*, IV, p. 93, note 4.

¹⁰⁹ *Ep.* 536, p. 915.

AUTONOMOUS NEUTRALIZATION

THE practical application of the principle of autonomous neutralization is, in certain cases, neither so formidable nor so difficult as its name might seem to indicate. It states this doctrine: that any state may, of its own volition, declare itself permanently neutral. A state may not only engage itself to remain neutral during a particular war; but may also assume an abstract neutrality, not conditioned by the acts of any other states. Such a doctrine implies an analogy between a state and a person; namely this, that a state is given a personality, a free will, and a body of rights and obligations.

From the time when states first become distinguishable amid the shifting flux of primeval society, they have experienced a steady accretion of personal characteristics. The "State" became a being, different from the aggregate of individuals comprehended within its territorial boundaries. Patriotism developed as a cult to foster this idea, and men have lived and died for the state, with a disregard for personal interests only equaled by that which the Christian martyrs showed. The sentiment expressed by Vergil, *Dulce et decore est, pro patria mori*, has not been among the least of the great motives that have stirred the human heart. In the face of this evidence, coincident almost with the dawn of history, we must admit that the characteristic of a distinct personality is not unsuitably attached to the organization of a political society.

From time to time there have been amplifications in the idea of the state. Of late, we believe, its importance has been vastly overemphasized. It has, in certain instances, become, not a means to an end, but an end in itself. The purer sentiments of patriotism have degenerated into a Baal-worship. The benevolent conception of the state, as the mother of her children, has given way to the sterner picture of a Moloch, into whose burning maw the dearest things of life must be hurled. While deprecating this misguided worship, and realizing that

the state is only an expedient for the better ordering of the lives of individuals, there yet remains enough of individuality and personality in the idea of the state so that we can assign to it certain rights and obligations, and speak with accuracy of a society of nations.

The rights of sovereignty are commonly classified; as (1) existence, (2) independence, (3) equality, (4) jurisdiction, (5) property, and (6) intercourse. These have all not the same antiquity as the recognized attributes of a state. By degrees each has come to take its place as a definite component of sovereignty. As nations have become more closely bound together, the precise limits of these rights have become increasingly important, and more exactly defined.

Permanent neutralization is either a seventh right of a state, or a complementary part to the right of existence or independence. By becoming permanently neutral a state does not take an action which invades any right of another state. It does not threaten its existence, compromise its independence, relegate it to an inferior station, limit its jurisdiction, take its property, nor curtail its intercourse. The fundamental rights of no state are infringed; and such an autonomous neutralization does not prevent or hinder the same neutralization on the part of every other state.

In establishing this principle as a right, we enter a field in the realm of sovereignty hitherto unexplored. A new dimension of the concept is discovered, which bears the only test which could challenge its validity; namely, any transgression of acknowledged rights already existing or of the new right when applied reciprocally. Obligations are implied, of course, but none which invade the sovereign prerogatives of a state. The acceptance of neutralization as a right adds to the complexity of sovereignty; but, in so doing, it also adds a higher connotation to sovereignty as a legal principle. Such a step is in the direction toward binding the world by a new *vinculum juris*, which should be fruitful in a more intimate understanding between nations, and hasten the day when the world can take steps to gather under a reign of law, and lay aside forever "that last dread arbiter." To abolish war, under the present legal *nexus* of our world, by the mere reiteration of its moral turpitude and by fervid invective against its dire destruction, is only a dream. To develop a basis of law that will ulti-

mately obviate war as a factor is a reasonable means to the realization of this dream.

The propaganda whereby these legal substitutes will supersede the more archaic conceptions must be the conviction that the unexplored fields of international law are yet vast; that the fruits therefrom are valuable; that discoveries therein are worthy of consideration; and, that conviction when acquired on any principle should be acted upon. In developing the right of autonomous neutralization as a sovereign right, the realm of application of no already existent right has been invaded. It is, therefore, a step in a new field, and its recognition must stir within all the determination to enforce it. Any infringement of this right, when enunciated by a sovereign state, should bring down the wrath of every other state, just as would the infringement of the right of existence. All the world must stand by these sovereign rights, if the world is to maintain its place of advancement. The world is even now at heart struggling to preserve these fundamental rights for the sake of their personal application to each state. The recalcitrant state must feel the weight of the world's hand at its throat. It is not only a concern of each state in its own interest, but it is the most altruistic of ideals, to strive to preserve intact those fundamental principles upon which the fabric of social life depends. When the invasion of sovereign rights can occur with impunity, it means that the world is receding with all speed to a state of international anarchy like that which brooded over Europe at the close of the Thirty Years' War. When any nation, for economic, moral, or political reasons, determines to assume the obligations and to demand the rights of a permanently neutral state, and when it has proclaimed that fact, it has in no way transcended its sovereign prerogatives, as we have shown, and the world must accept such a nation's act as binding, sanctioned by that ideal of law which has alone inspired all international life.

With such a conception of autonomous neutralization, we can readily see the nonessential character of the so-called guaranty, on which writers have set such great store as a ground for the validity of neutralization. As a *sine qua non* for state neutralization, a guaranty is of no value at all. The proclamation made by Switzerland in 1813 was the instrument which made that nation permanently neutral,

and not the Final Act of the Congress of Vienna two years later. But, when we discount entirely the juridical effect of a guaranty, let us not fail to acknowledge its psychological, and so, its political effect. The small boy may have a perfect right to the apple which the bully is holding from him, but that right seems far less worthy of consideration when enunciated by the aggrieved youngster than when announced by some bigger boy who stops to investigate the trouble.

Such a feeling exists among nations. Lawrence gave expression to it, when he said, "The agreement of the five Great Powers was held sufficient to elevate the neutralization of Switzerland into a principle of public law of Europe." . . .¹ Juridical right manifestly can have no such uncertain sanction as, "the agreement of the five Great Powers." Law must always be sharply distinguished from a mere *modus vivendi*. All civilized nations receive the principles which underlie sovereignty; the particular rights resulting therefrom are the objects of our investigation. A recent deduction, as yet imperfectly comprehended, may be strengthened and spread, if some "Great Powers" acknowledge it. Some nations, like some individuals, think at second hand. Therefore, we should look at a guaranty of neutralization, in the case of autonomous states, not as a proof that neutralization is valid, but as evidence that it is known. Its validity is arrived at deductively, its existence only is to be discovered empirically.

In an article on "The Position of Luxemburg According to International Law," M. Eyschen² goes into great detail through many pages, trying to ferret out of the enigmatical words of certain statesmen just what the responsibility of Europe was for Luxemburg's permanent neutralization. What those statesmen said was interesting evidence as to what they thought about the question; but it would be dangerous to maintain that what they said affected juridically the position of every European state in regard to Luxemburg. That state, as sovereign and independent, in 1848 proclaimed itself neutral forever. By that act every Power in the world was bound to respect its neutralization. The voice of sovereignty had spoken that which was its right

¹ Lawrence, T. J., *Essays on Modern International Law*, p. 487.

² Eyschen, M. P., *La Position du Luxembourg selon les Droits des Gens* in *Revue de Droit International et de Législation Comparée* (1903).

to speak; and no nation, as it esteemed its own sovereign rights, could dare gainsay it. We have a rather cynical, although perhaps characteristic, comment, made by Bismarck to the English Ambassador, quoted in the essay already cited, that, while he recognized a moral obligation to reckon on Luxemburg's neutralization, he did not consider this an "intrinsic guaranty." Just what he meant by this could, perhaps, never have been explained until lately. Hardly more lofty was the conception of Lord Stanley, who participated in the negotiations of 1867 for England. On June 14, he enunciated the British idea of the obligation.

Further, the guaranty now given is collective only. That is an important distinction. It means this, that in the event of a violation of neutrality, all the Powers who have signed the treaty may be called upon for their collective action. No one of those Powers is hable to be called upon to act singly or separately. It is a case, so to speak, of limited liability. We are bound in honor, — you cannot place a legal construction upon it, — to see, in concert with others, that these arrangements are maintained. But, if the other Powers join with us, it is certain that there will be no violation of neutrality. If they, situated exactly as we are, decline to join, we are not bound single handed to make up for the deficiencies of the rest. Such a guaranty has obviously rather the character of a moral sanction to the arrangements which it defends, than that of a contingent liability to make war. It would be a question to consider when the occasion arose. The House would be the judge as to whether such an extreme course was desirable or not.³

The occasion did arise, and to her honor England arose to it, and the House did decide, that the sovereign right of a state was a moral obligation, and as such the highest possible obligation. A response like that can only come from a nation which prizes the rights of sovereignty that are hers. England has jealously guarded these rights in times past and can feel best their value; and it was not surprising that she would quickly succor others when their rights were threatened. The words of Lord Stanley indicated a realization, perhaps frightful to him at the time, that there was in this doctrine of neutralization that which hypothecated a sovereign right, and its converse, a universal obligation. The absence of the force to compel obedience to the principle blinded him to the existence of the principle.

³ Eyschen, M. P. *La Position du Luxembourg selon Droits des Gens* in *Revue de Droit International et de Législation Comparée* (1903), p. 23.

Having shown that in autonomous neutralization we have a right, the question at once arises, What are the obligations which it involves? There are several. First, a state, upon assuming the condition, agrees to control its action in certain respects. As regards fortifications, "Although no definite rule can be laid down . . . where no provision is made, the right to construct and maintain fortresses remains."⁴ Armaments and neutralization are opposed in spirit. In these days we are hearing much of the value or danger of military establishments. In general, it seems fair to say that the soundness of our trust in law is indicated by the size of our armament. Civilization discards her weapons, as her trust in other means of protecting her rights increases. Internationally, we are in a state of affairs analogous to our own western frontier a few decades ago. There existed the forms of law, but the rope, bowie-knife, and revolver were always at hand. And they did not cease to be readily resorted to, until the minds of people felt that in law they had a surer means of justice.

When the right of neutralization is exercised by every nation, and that day is surely coming, fortifications will be useless. They will moulder like the rusty flint-lock over the chimney. But today, while autonomous neutralization is a right imperfectly exacted, and not allowed by all nations, like another musket, fortifications must stand "ready behind the door." Switzerland put two hundred thousand men on her frontiers in 1870, and three hundred thousand in 1914. The Swiss have shown themselves ready to defend their neutrality by well armed and disciplined battalions of hardy mountaineers. In the case of Belgium, her frontier defenses were limited, and those of little Luxemburg were eliminated altogether. In the light of recent events, the comparative wisdom of these two courses may be judged by each for himself.

Whether a neutralized state may contract alliances is a mooted point. Certain kinds of alliances are, obviously, not permissible. Any offensive alliance would be a direct contravention of the spirit and letter of neutralization. M. Kleen holds that a neutralized state is deprived of the right of contracting even a defensive alliance, for this might lead to a declaration of war to defend a right attacked. On the

⁴ Wicker, Cyrus F., "Some Effects of Neutralization," this JOURNAL, July, 1911 (Vol. V), p. 642.

other hand, Rivier would allow "a neutralized state to conclude defensive alliances, but only those where the ally was bound to defend it, and not where it is bound to defend the ally."

Certain political affiliations seem to be also perfectly compatible with such a condition. Luxemburg and Holland, for instance, maintained a union under one rule for many years until 1890. Alliances for economic and political efficiency are the best assurance for a neutralized state. The more of them that it can contract the better. And in general, a true idea of the concept involved in the right of neutralization, which is to bind the world closer, will prompt a state to tie itself as closely as possible by every peaceful treaty which it can make to as many states as possible. Tariff unions are one of the most general forms of international alliances. Such unions as the Postal exert no influence, that is, not in the direction of a closer and better understanding between nations, and offers no dangerous possibilities for a neutralized state. Indeed, the greatest ultimate good is going to flow from stressing our points of economic and social contact with other states. It was largely the economic difficulties over the various tariffs of our own States under the Confederation that led to a firmer union; and the *Zollverein* was the parent of the present German Empire.

Lastly, take the matter of colonial possessions as a very interesting case in point in the discussion of this subject. At present the autonomous neutralization of any of the larger states of the world seems to be an impossibility. There are many practical difficulties which would make such a state hesitate. It is true that, as yet, this attribute of sovereignty is not completely understood. But, while every large nation would decline to accept permanent neutrality for herself, she would be quite willing to protect her outlying dependencies in this way. A very large part of the armaments that have oppressed the peoples of Europe for so long have been justified by the existence of island possessions.

Some one will ask, Why is it that a state has a clear right to declare itself permanently neutralized, and yet has not a similar right to declare some island possession permanently neutral, without accepting such a condition for itself? In such a case a nation, if not neutralized herself, is demanding an international protection. She is demanding

that, in case war breaks out, the enemy must respect her possession in safety of what may be her most vulnerable point of attack. Such a demand has nothing to do with a nation's life or safety *per se*. It does ask for an immunity from the dangers of war and to be so placed in a more favorable position to carry on an aggressive program in another quarter. When the nation is herself neutralized the problem is simple. No reasons exist which should prevent a neutralized state from including her colonies under her protection. In fact if this condition be not allowed very little good accrues from the neutralization of the state proper. A nation, by virtue of its sovereignty, may determine its own status; but, to ask for special immunities with respect to its outlying territories, if it be not itself neutralized, takes us at once beyond the bounds of a sovereign right into the realm of political privilege. Nations hesitate to grant such privileges to their neighbors, because a degree of national restraint is assumed which is far ahead of almost any nation's capacity in this day. Is there, then, any way in which this process can be utilized in trying to solve the problem of possessions far from the home country?

Let us consider the Philippine Islands. We are even now considering cutting them off from our protection. It is the present policy of this government to cease its responsibility over their fortunes at the earliest date. There is no question but that today they are a liability to us; and at any time the eventualities of war may involve our country in great embarrassment, not to say danger, on account of them. The only way to secure their immunity, as a dependency of the United States, is by an international agreement. Any proclamation on the part of the United States alone to this effect would be little short of a pitiable spectacle of national presumption. No nation can maintain creditably a position of political dictatorship, transcending the bounds of its right, except with the backing of a sufficient armament.

Again, it would be extremely difficult to get even a few states to agree to the internationalization of the Philippines as an American possession. Japan is now obsessed with the spirit of extension. Germany is in the Orient. China has a right to consideration, and at no far distant day may prove herself well able to demand that consideration in her own name.

There is another course. Do not proclaim the neutralization of these islands. Do not ask a group of the Powers to insure their immunity. Nor would it be wise to cut them adrift as an independent state. They would soon find themselves within the sphere of influence of some other Power serving as a convenient naval base for extensive operations in the Pacific. Along with their independence and self-government, for which we are diligently preparing them, instruct them in this prerogative of a sovereign state. Then we may turn them off. Immediately upon their emancipation, the Philippine Islands can proclaim, in their own right, their permanent neutrality. As an independent nation, they can assume the plenitude of their powers.

Such a course obviously puts all nations in a new relation to this island state. The United States, then, could logically and with good grace acknowledge this condition, and adequate recognition would be straightway forthcoming. As a traditional sponsor for the political aspirations of a people desiring individual autonomy, states like France and England would be inclined to recognize the new nation, and there would be a well defined proclivity to recognize its neutralization, as well as its existence and independence.

Such an event, by itself, may seem entirely too ideal and academic. Like the economists' island, there is no such thing. But, with the example before them, would not other nations see a suitable way of treating certain of their own isolated possessions, where there is already a flourishing indigenous economic and political life? Why should not England, whose colonial policy since the Quebec Act has been increasingly individualistic, feel impelled to treat certain of its dependencies in this way?

The formation of a state in this manner, coupled with its subsequent autonomous neutralization, would be a boon to the cause of individual liberty; and, small though it was, it would add to the number of little states, neutralized and existing solely for the economic and moral welfare of the people dwelling therein. Such little states are ultimately to be the cement by which any larger system of world union will be bound together. One writer has expressed it thus:

Neutralization would recognize the individual right of the nationality to its own existence and to its own progress, though that progress

might be less rapid than expected by the civilized world, and certainly much slower than would be desired by the greed of the exploiter. It is for the law of nations, like the ordinary laws of society, to recognize, to respect, and to secure individual liberty.⁵

This process could be applied to several outlying colonial possessions of the present larger states of the world. With a few cases existing, the acknowledgment of the right would become increasingly more natural, till it finally was a matter of course. With that sort of sentiment lies the opportunity to lay the foundations for a world neutralization, carried out by the larger Powers, which is the great desideratum. World peace must be reached through a chain of events. Disarmament, when every nation is tensely sensitive, is out of the question. Witness Winston Churchill's proposition to Germany, and its effect. Disarmament is the last step in the chain. Men lay aside their weapons when they feel that they need them no longer. When colony after colony has been made, first, independent, then, at its request, been recognized as neutralized by its mother country and other countries; and this has been done in various cases, and made to include most of the colonial possessions of the world, armaments will of necessity disappear. In other words, a new custom will have sprung into existence. A principle of international law will have become sanctioned by usage. This is a natural process, needing only the idealist among the nations to spread it. The United States has played this role before. In the case of the Philippines she might illustrate this new conception of right and vindicate its validity. Such a step would not entail any added danger, for it would only continue our responsibility over these islands which would be shared, in theory, by other nations, and at worst would be no more arduous than it is at present.

STEWART MACMASTER ROBINSON.

⁵ Winslow, Erving, "Neutralization," this JOURNAL, April, 1908 (Vol. II), p. 376.

EDITORIAL COMMENT

THE UNITED STATES AT WAR WITH THE IMPERIAL GERMAN GOVERNMENT

On the second day of April, 1917, President Wilson appeared before the Congress of the United States and, after setting forth the lawless actions of the Imperial German Government and the impossibility of protecting the lives and property of his fellow countrymen engaged in pursuits which have always "even in the darkest periods of modern history, been deemed innocent and legitimate" advised the Congress of the United States to declare the existence of a state of war between the Imperial German Government and the United States. On the sixth day of April, 1917, the Congress, after grave deliberation and with a full sense of the responsibility which it would thus assume, declared a state of war to exist between the Imperial German Government and the United States.¹

What were the reasons which caused the President of the United States to advise the Congress to declare the existence of a state of war between the Imperial German Government and the United States; what were the reasons which caused the Congress to act upon the advice of the President to declare the existence of a state of war between the two countries; and what are the consequences which the President, the Congress, and the people of the United States consider as likely to follow from this state of war and its effective prosecution? We do not need to speculate as to the reasons, for the President himself has stated them, and if he had not they would be sufficiently in evidence, as the actions of Germany since the first day of August, 1914, in so far as the United States is concerned, speak louder than words; and we do not need to indulge in prophecy in order to forecast the consequences of this declaration on behalf of the United States, for the President himself has stated, in clear and unmistakable terms, that the autocracy which made these acts possible should end with the war.

¹ The President's address and the resolution of Congress are printed in the Supplement to this JOURNAL, pp. 143, 151.

The first part of the President's address deals with the specific acts of the Imperial German Government as causes of the war. The second part deals with the motives and purposes of the United States in entering the war, for while the acts of the Imperial German Government would justify resistance on behalf of the United States, the President wished it clearly to be understood, and therefore he put it plainly, that the motive and purpose in entering the war which had been thrust upon the United States was not merely to secure redress for the loss of property, not even redress for the destruction of human life, but to secure the repudiation of the Prussian conception of state and government, which could force a people to commit such acts, and to secure some form of international organization calculated to guarantee peace among nations through the administration of justice.

As far as the United States is concerned, the cause of its war with the Imperial German Government is the submarine, for the disputes of a serious nature and of a kind calculated to produce war between the two governments related to the conduct of the submarine, which, because Great Britain controlled the seas, was the only form of maritime warfare left to Germany; and Germany was apparently as unwilling to renounce maritime warfare as it was unwilling to allow its surface fleet to put to sea and to give battle to the British Navy. The United States did not object to the employment of the submarine, recognizing it as a vessel of war, possessed of all the rights of a vessel of war and subject to all the duties of a vessel of war. But the United States insisted from the beginning that the submarine should conform its actions to the rules of law to which vessels of war were subjected, and that, if it could not or would not conform its actions to such rules, it should not be used; for the law could not be changed to suit the submarine, which should itself be changed to meet the law if it could not, as then constructed, comply with the law as it then stood.

The Imperial German Government, on the contrary, insisted that, because of its frailty, the submarine could not comply with the laws and customs of war controlling the acts of surface vessels, that it could not comply with the formalities of visit and search, because, to do so, it would have to comport itself as a surface vessel, and as a surface vessel it would endanger its existence if it approached within gunshot of ordinary surface vessels. The Imperial German Government claimed for the submarine the right to operate under the surface to protect itself from attack, and, thus protected, to attack any vessel approach-

ing it because, under the surface, it could not distinguish the vessel of the enemy from the vessel of a neutral Power; it claimed the right to attack the vessel within range without warning because, if it gave warning, it exposed itself to danger; and finally, it claimed the right to torpedo and thus destroy the vessel without first putting its passengers and crew in a place of safety because the submarine was too small to take them on board.

If matters had rested here the question at issue between the two governments would have been academic. But matters did not rest here because the Imperial German Government put its conception of submarine warfare into practice, with the result, as the President informed the Congress in his address of the second of April, 1917, that "Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents. Even hospital ships and ships carrying relief to the sorely bereaved and stricken people of Belgium, though the latter were provided with safe conduct through the proscribed areas by the German Government itself and were distinguished by unmistakable marks of identity, have been sunk with the same reckless lack of compassion or of principle."

In the report of the Committee on Foreign Affairs of the House of Representatives accompanying the text of the declaration of a state of war with the Imperial German Government, numerous instances are given justifying the President's indictment, and while these instances are but few of the many, they are given as a sample of the indiscriminate submarine warfare of the Imperial German Government.

After a brief reference to the diplomatic correspondence between the two governments, in which Germany stated that instructions had been given "to abstain from all violence against neutral vessels recognizable as such" and that "it is very far indeed from the intention of the German Government . . . ever to destroy neutral lives and neutral property," the official report to which reference has been made continues:

Nevertheless the German Government proceeded to carry out its plans of submarine warfare and torpedoed the British passenger steamer *Falaba* on March 27, 1915, when one American life was lost, attacked the American steamer *Cushing* April 28 by airship, and made submarine attacks upon the American tank steamer *Gulftight* May 1, the British passenger liner *Lusitania* May 7 when 114 American

lives were lost, and the American steamer *Nebraskan* on May 25, in all of which over 125 citizens of the United States lost their lives, not to mention hundreds of noncombatants who were lost and hundreds of Americans and noncombatants whose lives were put in jeopardy.

The British mule boat *Armenian* was torpedoed on June 28, as a result of which 20 Americans are reported missing.

After a further reference to the diplomatic correspondence, the official report thus proceeds:

Subsequently, the following vessels carrying American citizens were attacked by submarines:

British liner *Orduna* July 9.

Russian steamer *Leo* July 9.

American steamer *Leelanaw* July 25.

British passenger liner *Arabic* August 19.

British mule ship *Nicosian* August 19.

British steamer *Hesperian* September 4.

In these attacks 23 Americans lost their lives, not to mention the large number whose lives were placed in jeopardy.

After another reference to diplomatic correspondence, citing German promises, the official report continues:

Following this accumulative series of assurances, however, there seems to have been no abatement in the rigor of submarine warfare, for attacks were made in the Mediterranean upon the American steamer *Communiaw* on December 3, the American steamer *Petrolite* December 5, the Japanese liner *Yasaka Maru* December 21, and the passenger liner *Persia* December 30. In the sinking of the *Persia* out of a total of some 500 passengers and crew only 165 were saved. Among those lost was an American consul traveling to his post.

After again referring to correspondence between the two countries, continuing the assurance of the German Government, in the language of the report, "that neutral and enemy merchant vessels, passenger as well as freight ships, should not be destroyed except upon the passengers and crew being accorded safety," the official report thus chronicles the loss of life and property during the year 1916:

On March 1, 1916, the unarmed French passenger steamer *Patria*, carrying a number of American citizens was attacked without warning. On March 9 the Norwegian bark *Silius*, riding at anchor in Havre Rhodes, was torpedoed by an unseen submarine and one of the seven Americans on board was injured. On March 16 the Dutch passenger steamer *Tubantia* was sunk in the North Sea by a torpedo. On March 16 the British steamer *Bervindale* was torpedoed without warning off Bantry Island with four Americans on board. On March 24 the British unarmed steamer *Englishman* was, after a chase, torpedoed and sunk by the submarine *U. 19*, as a

result of which one American on board perished. On March 24 the unarmed French cross-channel steamer *Sussex* was torpedoed without warning, several of the 24 American passengers being injured. On March 27 the unarmed British liner *Manchester Engineer* was sunk by an explosion without prior warning, with Americans on board, and on March 28 the British steamer *Eagle Point*, carrying a Hotchkiss gun, which she did not use, was chased, overtaken, and sunk by a torpedo after the persons on board had taken to the boats.

And after a final reference to the correspondence between the two governments, resulting in the assurance of May 4, 1916, that new orders had been issued to the German naval forces "in accordance with the general principles of visit and search and the destruction of merchant vessels recognized by international law," and quoting the withdrawal of this assurance contained in the German note of January 31, 1917, the report continues and concludes as follows this phase of the question:

On February 3 [1917] one American ship was sunk, and since that date six American ships flying the American flag have been torpedoed, with a loss of about 13 American citizens. In addition, 50 or more foreign vessels of both belligerent and neutral nationality with Americans on board have been torpedoed, in most cases without warning, with a consequent loss of several American citizens.

The President's statement thus appears to be borne out by the facts, for enemy merchant vessels carrying passengers or freight, and neutral vessels, of whatever nationality, have indiscriminately been sunk by the German submarine lying in wait for its prey.

But there is a further charge made by the President of even a more serious character, for in the address of the second of April he states that "hospital ships and ships carrying relief to the sorely bereaved and stricken people of Belgium" had been destroyed by German submarines, although these vessels were supposed to be protected by the promise of the Imperial German Government, evidenced by safe-conducts. On this point the official report previously quoted says:

When the Commission for Relief in Belgium began its work in October, 1914, it received from the German authorities, through the various Governments concerned, definite written assurances that ships engaged in carrying cargoes for the relief of the civil population of Belgium and northern France should be immune from attack. In order that there may be no room for attacks upon these ships through misunderstanding each ship is given a safe-conduct by the German diplomatic representative in the country from which it sails, and, in addition, bears conspicuously upon its sides markings which have been agreed upon with the German authorities; furthermore, similar markings are painted upon the decks of the ships in order that they may be readily recognizable by aeroplanes.

Upon the rupture of relations with Germany the commission was definitely assured by the German Government that its ships would be immune from attack by following certain prescribed courses and conforming to the arrangements previously made.

Despite these solemn assurances there have been several unwarranted attacks upon ships under charter to the commission.

On March 7 or 8 the Norwegian ship *Storstad*, carrying 10,000 tons of corn from Buenos Aires to Rotterdam for the commission was sunk in broad daylight by a German submarine despite the conspicuous markings of the commission which the submarine could not help observing. The *Storstad* was repeatedly shelled without warning and finally torpedoed.

On March 19 the steamships *Tunisie* and *Haelen*, under charter to the commission proceeded to the United States under safe conducts and guarantees from the German minister at The Hague and bearing conspicuous markings of the commission, were attacked without warning by a German submarine outside the danger zone (56° 15' north, 5° 32' east). The ships were not sunk, but on the *Haelen* seven men were killed, including the first and third officers; a port boat was sunk; a hole was made in the port bunker above the water line; and the ships sustained sundry damages to decks and engines.

In a latter portion of the President's address he calls attention to the difficulty of maintaining peace with the Imperial German Government and enumerates a series of transactions within American jurisdiction comparable to the conduct of the submarine warfare upon the high seas. They are apparently not enumerated by the President as in themselves the cause of war but as a matter of aggravation. Thus he says:

One of the things that has served to convince us that the Prussian autocracy was not and could never be our friend is that from the very outset of the present war it has filled our unsuspecting communities and even our offices of government with spies and set criminal intrigues everywhere afoot against our national unity of counsel, our peace within and without, our industries and our commerce. Indeed it is now evident that its spies were here even before the war began; and it is unhappily not a matter of conjecture but a fact proved in our courts of justice that the intrigues which have more than once come perilously near to disturbing the peace and dislocating the industries of the country have been carried on at the instigation, with the support, and even under the personal direction of official agents of the Imperial Government accredited to the Government of the United States. Even in checking these things and trying to extirpate them we have sought to put the most generous interpretation possible upon them because we knew that their source lay, not in any hostile feeling or purpose of the German people toward us (who were, no doubt, as ignorant of them as we ourselves were), but only in the selfish designs of a Government that did what it pleased and told its people nothing. But they have played their part in serving to convince us at last that that Government entertains no real friendship for us and means to act against our peace and security at its

convenience. That it means to stir up enemies against us at our very doors the intercepted note to the German Minister at Mexico City is eloquent evidence.

In the official report of the Committee on Foreign Affairs of the House of Representatives, containing the instances of German submarine warfare, there is an elaborate but far from complete enumeration of the acts of German officials and of German sympathizers in the domestic affairs of the United States. The few instances actually stated, which are to be taken as a sample of the many which are not chronicled, are twenty-one in number and are thus stated in the report in brief and summary form:

1. By direct instructions received from the foreign office in Berlin the German Embassy in this country furnished funds and issued orders to the Indian independence committee of the Indian Nationalist Party in the United States. These instructions were usually conveyed to the committee by the military information bureau in New York (von Igel) or by the German consulates in New York and San Francisco.

Dr. Chakrabarty, recently arrested in New York City, received, all in all, according to his own admission, some \$60,000 from von Igel. He claims that the greater portion of this money was used for defraying the expenses of the Indian revolutionary propaganda in this country, and, as he says, for educational purposes. While this is in itself true, it is not all that was done by the revolutionists. They have sent representatives to the Far East to stir up trouble in India and they have attempted to ship arms and ammunition to India. These expeditions have failed. The German Embassy also employed Ernest T. Euphrat to carry instructions and information between Berlin and Washington under an American passport.

2. Officers of interned German warships have violated their word of honor and escaped. In one instance the German consul at Richmond furnished the money to purchase a boat to enable six warrant officers of the steamer *Kronprinz Wilhelm* to escape after breaking their parole.

3. Under the supervision of Capt. von Papen and Wolf von Igel, Hans von Wedell and, subsequently, Carl Ruroede maintained a regular office for the procurement of fraudulent passports for German reservists. These operations were directed and financed in part by Capt. von Papen and Wolf von Igel. Indictments were returned, Carl Ruroede sentenced to the penitentiary, and a number of German officers fined. Von Wedell escaped and has apparently been drowned at sea. Von Wedell's operations were also known to high officials in Germany. When Von Wedell became suspicious that forgeries committed by him on a passport application had become known, he conferred with Capt. von Papen and obtained money from him wherewith to make his escape.

4. James J. F. Archibald, under cover of an American passport and in the pay of the German Government through Ambassador Bernstorff, carried dispatches for Ambassador Dumba and otherwise engaged in unneutral activities.

5. Albert Sanders, Charles Wunnonberg, and others, German agents in this country, were engaged, among other activities, in sending spies to England equipped

with American passports, for the purpose of securing military information. Several such men have been sent. Sanders and Wunnonberg have plead guilty to indictments brought against them in New York City as has George Voux Bacon, one of the men sent abroad by them.

6. American passports have been counterfeited and counterfeits found on German agents. Baron von Cupenberg, a German agent, when arrested abroad, bore a counterfeit of an American passport issued to Gustav C. Roeder; Irving Guy Ries received an American passport, went to Germany, where the police retained his passports for 24 hours. Later a German spy named Carl Paul Julius Hensel was arrested in London with a counterfeit of the Ries passport in his possession.

7. Prominent officials of the Hamburg-American Line, who under the direction of Capt. Boy-Ed, endeavored to provide German warships at sea with coal and other supplies in violation of the statutes of the United States, have been tried and convicted and sentenced to the penitentiary. Some 12 or more vessels were involved in this plan.

8. Under the direction of Capt. Boy-Ed and the German consulate at San Francisco, and in violation of our laws, the steamships *Sacramento* and *Masellan* carried supplies from San Francisco to German war vessels. The *Olsen* and *Mahoney*, which was engaged in a similar enterprise, was detained. The money for these ventures was furnished by Capt. Boy-Ed. Indictments have been returned in connection with these matters against a large number of persons.

9. Werner Horn, a lieutenant in the German Reserve, was furnished funds by Capt. Franz von Papen and sent, with dynamite, under order to blow up the International Bridge at Vanceboro, Me. He was partially successful. He is now under indictment for the unlawful transportation of dynamite on passenger trains and is in jail awaiting trial following the dismissal of his appeal by the Supreme Court.

10. Capt. von Papen furnished funds to Albert Kaltschmidt, of Detroit, who is involved in a plot to blow up a factory at Walkerville, Canada, and the armory at Windsor, Canada.

11. Robert Fay, Walter Scholtz, and Paul Daeche have been convicted and sentenced to the penitentiary and three others are under indictment for conspiracy to prepare bombs and attach them to allied ships leaving New York Harbor. Fay, who was the principal in this scheme, was a German soldier. He testified that he received finances from a German secret agent in Brussels, and told von Papen of his plans, who advised him that his device was not practicable, but that he should go ahead with it, and if he could make it work he would consider it.

12. Under the direction of Capt. von Papen and Wolf von Igel, Dr. Walter T. Scheele, Capt. von Kleist, Capt. Wolpert, of the Atlas Steamship Co., and Capt. Rode, of the Hamburg-American Line, manufactured incendiary bombs and placed them on board allied vessels. The shells in which the chemicals were placed were made on board the steamship *Frederick der Grosse*. Scheele was furnished \$1,000 by von Igel wherewith to become a fugitive from justice.

13. Capt. Franz Rintelen, a reserve officer in the German Navy, came to this country secretly for the purpose of preventing the exportation of munitions of war to the allies and of getting to Germany needed supplies. He organized and financed Labor's National Peace Council in an effort to bring about an embargo on the shipment of munitions of war, tried to bring about strikes, etc.

14. Consul General Bopp, at San Francisco, Vice Consul General Von Schaick, Baron George Wilhelm von Brincken (an employee of the consulate), Charles C. Crowley, and Mrs. Margaret W. Cornell (secret agents of the German consulate at San Francisco) have been convicted of conspiracy to send agents into Canada to blow up railroad tunnels and bridges, and to wreck vessels sailing from Pacific coast ports with war materials for Russia and Japan.

15. Paul Koenig, head of the secret-service work of the Hamburg-American Line, by direction of his superior officers, largely augmented his organization and under the direction of von Papen, Boy-Ed, and Albert carried on secret work for the German Government. He secured and sent spies to Canada to gather information concerning the Welland Canal, the movements of Canadian troops to England, bribed an employee of a bank for information concerning shipments to the allies, sent spies to Europe on American passports to secure military information, and was involved with Capt. von Papen in plans to place bombs on ships of the allies leaving New York Harbor, etc. Von Papen, Boy-Ed, and Albert had frequent conferences with Koenig in his office, at theirs, and at outside places. Koenig and certain of his associates are under indictment.

16. Capt. von Papen, Capt. Hans Tauscher, Wolf von Igel, and a number of German reservists organized an expedition to go into Canada, destroy the Welland Canal, and endeavor to terrorize Canadians in order to delay the sending of troops from Canada to Europe. Indictments have been returned against these persons. Wolf von Igel furnished Fritzen, one of the conspirators in this case, money on which to flee from New York City. Fritzen is now in jail in New York City.

17. With money furnished by official German representatives in this country, a cargo of arms and ammunition was purchased and shipped on board the schooner *Annie Larsen*. Through the activities of German official representatives in this country and other Germans a number of Indians were procured to form an expedition to go on the steamship *Maverick*, meet the *Annie Larsen*, take over her cargo, and endeavor to bring about a revolution in India. This plan involved the sending of a German officer to drill Indian recruits and the entire plan was managed and directed by Capt. von Papen, Capt. Hans Tauscher, and other official German representatives in this country.

18. Gustav Stahl, a German reservist, made an affidavit which he admitted was false, regarding the armament of the *Lusitania*, which affidavit was forwarded to the State Department by Ambassador Bernstorff. He pled guilty to an indictment charging perjury, and was sentenced to the penitentiary. Koenig, herein mentioned, was active in securing this affidavit.

19. The German Embassy organized, directed, and financed the Hans Libeau Employment Agency, through which extended efforts were made to induce employees of manufacturers engaged in supplying various kinds of material to the allies to give up their positions in an effort to interfere with the output of such manufacturers. Von Papen indorsed this organization as a military measure, and it was hoped through its propaganda to cripple munition factories.

20. The German Government has assisted financially a number of newspapers in this country in return for pro-German propaganda.

21. Many facts have been secured indicating that Germans have aided and encouraged financially and otherwise the activities of one or the other factions in

Mexico, the purpose being to keep the United States occupied along its borders and to prevent the exportation of munitions of war to the allies; see, in this connection, the activities of Rintelen, Stallforth, Kopf, the German consul at Chihuahua, Krum-Hellen, Felix Somerfeld (Villa's representative at New York), Carl Heynen, Gustav Steinberg, and many others.

It will be observed that these interferences with the domestic economy of the United States were at a time when this country was neutral, when the Imperial German Secretary of State for Foreign Affairs abounded in expressions of friendship and consideration, and when the Imperial German Ambassador enjoyed the hospitality of a neutral country, whose rights upon the high seas had been systematically violated by the Imperial German Ambassador, members of the official staff, and partisans of Germany in his employ. It is hard to believe that these things are so, yet the Zimmermann letter would lead us to suspect them, if stated on credible authority, and the authority upon which we have them is that of the Government of the United States, in many instances the judgments of courts of the United States in which the transactions had been established by proof and the perpetrators convicted of their commission and sentenced to prison in judicial proceedings in accordance with the laws of the United States. The text of the Zimmermann letter, as contained in the report of the Committee on Foreign Affairs, is as follows:

Berlin, January 19, 1917

On the first of February we intend to begin submarine warfare unrestricted. In spite of this it is our intention to endeavor to keep neutral the United States of America.

If this attempt is not successful we propose an alliance on the following basis with Mexico: That we shall make war together and together make peace. We shall give general financial support, and it is understood that Mexico is to reconquer the lost territory in New Mexico, Texas, and Arizona. The details are left to you for settlement.

You are instructed to inform the President of Mexico of the above in the greatest confidence as soon as it is certain there will be an outbreak of war with the United States, and suggest that the President of Mexico on his own initiative should communicate with Japan suggesting adherence at once to this plan; at the same time offer to mediate between Germany and Japan.

Please call to the attention of the President of Mexico that the employment of ruthless submarine warfare now promises to compel England to make peace in a few months.

(Signed) ZIMMERMANN.

It was therefore under the eyes of Congress, as it was in the mind of the President and in the heart of the American people. Without it there were causes of war, with it there was slight chance that war

could be avoided. It is doubtful whether it would have produced war if there had not been other and impelling reasons for the resort to arms. It is doubtful if it can properly be included among the causes of the war, certainly it was not a distinct cause; it was rather the culmination of a series of unfriendly acts and it showed the spirit and purpose with which those acts had been committed. It was rather a matter of aggravation, throwing fuel on the flames, than creating of itself a conflagration.

The President properly stated in his address of April 2d to the Congress that he was assuming a grave responsibility in recommending a declaration of the existence of a state of war against the Imperial German Government, for the day has long since passed, at least in democratic countries, where the head of a state, whether he be monarch or president, can go to war as the king went a-hunting. War may be an imperial, it is no longer a royal, sport, and it never has been and it never will be, it is to be hoped, a presidential one. War is ordinarily declared in a moment of excitement and reason is likely to be swayed by enthusiasm; but we cannot today in democracies justify a declaration of war unless the cause be just, and, however we may deceive ourselves, we cannot deceive posterity, which passes alike upon the acts of autocrat, constitutional monarch, president, and people. We must decide according to our knowledge of present conditions and according to these conditions our actions are to be judged in the first instance, but the future must finally decide the question.

The President has stated the case of the United States against the Imperial Government clearly and in detail. He enumerated the special reasons which, in his opinion, would be a proper cause of armed action. He has searched his own heart and the conscience of the American people, that the motives and objects of the war may not only justify but require in the given circumstances and conditions the declaration of a state of war. It is indeed a grave responsibility which the President assumed in recommending the war, which the Congress assumed in declaring its existence, and which the people of the United States assumed in carrying it on.

We believe that the reasons given are causes, not pretexts, that the motives and purposes are sincere and sufficient; but on all these matters posterity has the final word — for whether we will or no, "Die Weltgeschichte ist das Weltgericht."

JAMES BROWN SCOTT.

THE RELATIONS BETWEEN THE UNITED STATES AND THE
CENTRAL POWERS

The actual status of the relations between the United States and the Central Powers, so far as we are officially informed, is as follows:

The United States has declared war upon Germany, while Germany has said and done nothing in reply.

Austria-Hungary, Turkey and Bulgaria have ceased diplomatic relations with this country, which in turn has taken similar action, but no war between them has been declared.

The three Powers just named are in offensive and defensive coöperation with Germany, with whatever consequences that may imply as regards Germany's enemies.

The problem is to determine the nature of our relations with the four states above mentioned.

And first as to Germany.

Article 1 of Hague Convention No. 3, 1907, is as follows:

The contracting Powers recognise that hostilities between them must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

This was ratified by both Germany and the United States.

Accordingly, having exhausted all others means of protection, and authorized by Congress, war was declared against the Imperial Government of Germany in these words "a state of war exists." It was, therefore, not a conditional, but an absolute announcement. This was on the 6th of April, 1917. From that day to this, so far as appears, no counter declaration has been made by Germany, nor has any aggressive act taken place up to the time of writing other than further submarine attacks upon American ships of trade and their attempts at defense.

Nevertheless, no one can doubt that war exists, reciprocal war, no matter what formalities Germany may have dispensed with.

Next as to Austria-Hungary. There is here no doubt of an alliance with our enemy Germany, an alliance nominally defensive. Although the exact terms are not accessible, the main provision is well known, namely, that Austria is bound to coöperation in arms with Germany if the latter is attacked by two Powers, meaning France and Russia. Italy was similarly bound, but decided that the war was offensive,

not defensive, and that therefore no *casus foederis* had arisen. But Austria thought otherwise. The question for us then is, if we, being at war with Germany, are likewise automatically at war with Austria, the ally of Germany, although so far as public official statements show we have merely severed diplomatic relations.

Text-book opinion bearing on this topic is neither plentiful nor uniform.

Bynkershoek thought that "allies form one state" with a confederated belligerent; and Phillimore approves, saying:

This principle, duly considered and applied, furnishes a solution for all questions relating to the position, the duties and the rights of an ally. Thus for instance, the doctrine that all commerce and communication is interdicted with the enemy is enforced, not only against the subjects of the belligerent but also against those of the ally, upon the supposition that the rule was founded on a strong and universal principle which allied states in war had a right to notice and apply mutually to each other's subjects.

On the other hand, Halleck says plainly that "the simple fact of there being an alliance between our enemy and other nations would not justify us in treating such nations as belligerents." He declares further:

A warlike alliance made by a third party before the war with a state, then our friend but now our enemy, will not as a general rule be of itself a sufficient cause for commencing hostilities against such third party; for there may be good reason why he should not regard himself as bound by the obligations of the alliance. It would certainly be very impolitic, as well as improper, for us to treat as a belligerent one who may not be disposed to become our enemy.

To this Creasy adds:

You certainly have a right in such a case to call upon the ally of your opponent to declare whether he means to act against you or not; and if he refuses to give an express renunciation of hostile intentions toward you, you are in every way justified in forthwith treating him as your enemy, unless you consider as above explained, that it is for your interest to forbear from doing so.

Perhaps in the case of our present relations with Austria these two principles will be found reconcilable and can be combined. We should certainly forbid trading with her as akin to trading with an enemy, for to supply her with rubber, copper, flour, let alone munitions of war, is equivalent to supplying Germany with them. On the other hand, we may well await the issue of events before unnecessarily taking on another enemy. If Austrian submarines attack our ships, we shall

defend them; and if we choose to insist upon a disclaimer of the right to torpedo without warning, that is a conditional ultimatum with war declared in the background. As matters stand, we may fairly say, I think, that Austria stands to us in certain aspects as an enemy, but that this as yet does not imply active declared hostilities.

As regards Turkey, the case is yet more indistinct. Turkey was thrust into the war through the boat attack upon Odessa which was due to German intrigue. This was followed by the preaching of a Holy War, which in turn led to the British declaration of November 5, 1914, that "a state of war exists with Turkey" on account of hostile acts by Turkish forces under German officers. I find no record of an actual alliance between Turkey and Germany, though very likely there is one. But we do know that Turkish military operations for more than two years have been directed by German policy under German command to such a degree that Turkish forces have coöperated with Germany upon all her battle lines except the Western one. This is alliance whether formally agreed to or not. Turkey's case then is not essentially different from Austria's, and we may fairly be governed in our relations with her by the facts as they develop, prohibiting trade with her meanwhile.

With Bulgaria we are still less likely to come into contact and to be forced to define relations.

If and when United States troops confront the soldiers of Germany's allies on some theater of war, it will be needful to recognize a state of war between their respective governments, in order to know the conditions, laid down by treaty, Hague Convention or by the general principles of law, under which they shall engage. Until then, there are only the less pressing problems involved in a state of war, questions of trade, of partnership, of contract and so on, which need solution. These at present, owing to the stringent blockade of the coasts of our enemy's allies and to the hostile encirclement of their territories, may not become practical questions at all.

But if our State Department were asked today if war existed with Austria or with Turkey, it would probably say No, and be justified in its answer.

T. S. WOOLSEY.

THE CHENGCHIA TUN AGREEMENT ¹

The town of Chengchia Tun is situated some 53 miles northwest of Ssuningkai, which is a station on the South Manchuria Railway. Ssuningkai is about one hundred miles north of Mukden and is to be the junction of a branch railway line to be built through Chengchia Tun to Taonan Fu, a concession for which was granted to Japan in October, 1913. Taonan Fu and Chengchia Tun are situated in a region which until a few years ago was included in Eastern Inner Mongolia, but is now incorporated in the Province of Shengking, the southernmost province of Manchuria.

It is stated that Japanese troops had been stationed in Chengchia Tun for two years when the trouble broke out. The Chinese Government had protested against their presence there and they do not appear to have had the right to be there, since the town is fifty-three miles from the nearest station of the Japanese Railway Zone.

As a result of the Russo-Japanese War, the Japanese fell heir to the privileges previously enjoyed by Russians in South Manchuria. Among these were the possession of the leased territory of the Kwantung Peninsula and the control of the South Manchuria Railway.

The first grant made by China to Russians of a right to construct and operate a railway in Manchuria was that of 1896 for the Chinese Eastern Railway accorded to the Russo-Chinese Bank. This bank was nominally owned by Chinese and Russians, but as a matter of fact it was wholly controlled by Russians and in close relationship with the Russian Government. The agreement as to the Chinese Eastern Railway provided that China and Russia were to establish a railway company. The seal was to be issued by the Chinese Government and the Director General to be appointed by China. But the company in reality was almost wholly Russian and controlled by Russia.

Article V of the agreement stipulated that the Chinese Government should take measures for the protection of the railway line. When, therefore, the company's statutes were issued the paragraph dealing with this subject read as follows:

8. The Chinese Government has undertaken to adopt measures for securing the safety of the railway and of all employed on it against any extraneous attacks. The preservation of law and order on the lands assigned to the railway and its

¹ Printed in Supplement to this JOURNAL, p. 112.

appurtenances shall be confided to police agents appointed by the company. The company shall for this purpose draw up and establish police regulations.

Under this provision one would naturally expect a Chinese police force to be established for the protection of the railway, but the company being in reality Russian, a force of Russian railway guards was organized and stationed along the line to function within a limited region along the railway known as the Railway Zone.

After the convention of June 24, 1896, had secured permission to build a branch line from the Chinese Eastern Railway to Port Arthur and Dalny, the same policy was adopted for the protection of that line. By the Treaty of Portsmouth, the South Manchuria Railway from Kuangchengtzu to Port Arthur and Dalny passed into the possession of Japan, and in the treaty with Japan of December 22, 1905, China gave consent to the transfer. On the same day China and Japan entered into another agreement of which Article II stipulates that:

in view of the earnest desire expressed by the Imperial Chinese Government to have the Japanese and Russian troops and *railway guards* in Manchuria withdrawn as soon as possible, the Imperial Japanese Government, in the event of Russia agreeing to the withdrawal of her railway guards or in case other proper measures are agreed to between China and Russia, consent to take similar steps accordingly. When tranquillity shall have been reestablished in Manchuria and China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia.

These conditions do not appear to have been fulfilled, and consequently no diminution has taken place in the number of the railway guards.

By the agreement from which quotation was just made sixteen towns were added to those in Manchuria already opened to foreign residence and trade.

Immediately after taking over control of the South Manchuria Railway, Japan incorporated the South Manchuria Railway Joint Stock Company and established a government for the leased territory of Kwantung, whose Governor General was given authority to protect the South Manchuria Railway and supervise the affairs of the railway company. Among other provisions, the Imperial Ordinance contained the following:

Article 10. When the Governor General deems it necessary for the maintenance of the welfare and order of the territory under his jurisdiction or for the protection or supervision of the railway lines, he may employ military force.

It was further provided that consular officers in South Manchuria might be appointed Secretaries of the Government-General and that such consular officers should take charge of police affairs along the railway lines.

Some modification of this arrangement has since been made, but the important fact to be borne in mind is that there thus gradually grew up in South Manchuria an exercise of police authority in the railway zone by Japanese consular authorities.

It is well known that Japanese as well as other foreign consuls in China exercise extraterritorial jurisdiction over their own nationals, and in the exercise of this authority foreign consulates must be provided with constables or marshals authorized to make arrests and with officers to serve as judges of the consular courts. In some foreign settlements, therefore, such as Shanghai, where police powers have not been expressly reserved by China, local municipal governments have been established by the foreign residents and foreign police employed to preserve order. Such police exercise jurisdiction not only over the foreign residents, but also over Chinese living in the settlements.

After Japanese consuls had exercised police powers in the railway zone of the South Manchuria Railway without protest, their jurisdiction began to extend beyond the zone. Arrests were made even within the walled city of Mukden, and wherever Japanese consuls were stationed, even in places where no Japanese settlement existed, Japanese police also were apt to be found, with the result that altercations between Chinese citizens and Japanese police became of somewhat frequent occurrence.

When in May, 1915, Japan and China signed a treaty respecting South Manchuria and Eastern Inner Mongolia, Japanese subjects were granted the right to reside, travel and engage in business in those regions, but it was expressly stipulated that such Japanese subjects should be required to have passports, register with the local authorities and submit to Chinese police laws and ordinances and to the taxation of China.

Notwithstanding the treaty, Japanese police forces continued to enlarge the field of their operations. The force at Chengchia Tun remained in spite of Chinese protests. Some excuse perhaps may be found in the disturbed condition of the region, infested as it was by Mongol bandits. Another excuse may be found in the fact that the survey of the proposed railway branch line was begun last summer,

and if a railway line may be policed why not a party of railway surveyors in a prospective railway zone?

The quarrel which very easily occurred under these circumstances in Chengchia Tun led to certain demands by the Japanese Government. Following the precedent set in the case of the twenty-one demands presented to China in 1915, a portion of the demands made in relation to Chengchia Tun were put down as *desiderata*.

There were four demands as follows:

1. Punishment of the general commanding the 28th Division.
2. The dismissal of the officers at Chenchiatun responsible for the occurrence, as well as the severe punishment of those who took direct part in the fracas.
3. Proclamation to be posted ordering all Chinese soldiers and civilians in South Manchuria and Eastern Inner Mongolia to refrain from any act calculated to provoke a breach of the peace with Japanese soldiers or civilians.
4. China to agree to the stationing of Japanese police officers in places in South Manchuria and Eastern Inner Mongolia where their presence was considered necessary for the protection of Japanese subjects. China also to agree to the engagement by the officials of South Manchuria of Japanese police advisers.

The *desiderata* were also four:

1. Chinese troops stationed in South Manchuria and Eastern Inner Mongolia to employ a certain number of Japanese military officers as advisers.
2. Chinese military cadet schools to employ a certain number of Japanese military officers as instructors.
3. The Military Government of Mukden to proceed personally to Port Arthur to the Japanese Military Government of Kwantung to apologize for the occurrence and to tender similar personal apologies to the Japanese Consul General in Mukden.
4. Adequate compensation to be paid by China to the Japanese sufferers and to the families of those killed.

In the final settlement, as will be seen, the first three demands were granted in substance; reproof was substituted for punishment in the case of the general commanding the 28th Division, and the officers instead of being dismissed and severely punished, were to be punished according to law, and only severely punished if the law so provided.

The fourth demand was rejected by China and withdrawn by Japan. The first two of the *desiderata* were refused by China and withdrawn by Japan. Instead of requiring the Military Governor of Mukden to proceed to Port Arthur in person and apologize for the occurrence, as expressed in the third of the *desiderata*, it was agreed that he might send a representative to express his regret.

As for the fourth of the *desiderata*, a solatium was allowed to one Japanese only. An important item of the agreement is that stipulating that the Japanese soldiers in the district should be withdrawn.

The withdrawal of the obnoxious demands reflects credit upon the Japanese Government as evidencing an unwillingness to enforce exorbitant demands of an unjust character, and the agreement to withdraw the troops shows a desire to remove the root of the difficulty and to respect the sovereignty of China.

JAMES BROWN SCOTT.

THE ROLE PLAYED BY THE STATE DUMA IN THE FORMATION OF
THE NEW RUSSIA ¹

The first State Duma was called on April 27, 1906. Hundreds of thousands of people gathered on the streets of the capital to greet the representatives of the people. At this solemn moment in Russia's history, the representatives of the country gathered for the first time in the Winter Palace to meet the Czar. In the foreground vivid court uniforms, and in the background modest black coats, stood out strikingly. The deputies awaited the speech of the Czar, standing ready to meet him. The Czar spoke. It was a speech replete with reticence and noteworthy for its omissions, and the answer of these modestly-dressed people was their silence. "The silence of people is a lesson for kings," said Mirabeau at the end of the eighteenth century. But the lesson availed not this time.

Despite the fact that sentiment throughout the country was in favor of the first State Duma, the Duma was dismissed seventy-two days after its calling, by order of the monarch. A reëlection was ordered by the Czar's decree in the hope of securing more conservative deputies. But the results of the election did not justify the expectations of the conservative element in Russia, for the second Duma was even more radical than the first. Then, on the initiative of the Prime Minister, P. A. Stolypin, the government availed itself of a privilege to which it no longer had any right, in accordance with the laws it had itself enacted. On June 3, 1907, the Czar issued a new decree, by which the franchise was granted almost exclusively to the most conservative classes — the nobility and clergy. And although public opinion was

¹ This note kindly contributed by Dr. B. E. Shatsky, of the University of Petrograd.

deeply incensed at this change, the physical power of the government insured order, and the new elections to the Duma were made in accordance with the newly issued decree.

As a result, the majority of the third State Duma proved to be of the extremely moderate Octobrists, led by the recently-resigned Secretary of War, A. I. Gouchkoff. They stood ready to lend all help to the government, fully believing in the government's readiness to live up to the reforms promised in the Manifesto of October 17, 1905. This alliance between A. I. Gouchkoff and P. A. Stolypin lasted for quite a time, until the Octobrists were finally convinced that the government intended least of all to carry into effect those reforms promised in the Manifesto of October. From that hour, the Octobrists (who also constituted the majority in the fourth Duma) began their gradual though slow transition from the support of the government to its open censure.

The war came. Not only the Octobrists, but all other parties as well, in vigorous patriotic impulse, forgot all their dissatisfaction and were ready to stand behind the Czar in the strife with the alien enemy. This impulse was neither understood nor appreciated. The same inefficient and partly criminal element was left at the head of the government. When the Russian army for lack of ammunition began its retreat under the destructive fire of the enemy, a group of social leaders visited that "good-hearted old man," the Prime Minister, J. L. Goremykin. The latter thus began the conversation: "I don't understand it; why are you so excited?" And this, at the time when England and France had already organized Coalition Cabinets where the brain and the strength of the people were represented!

During this period the State Duma was either not called at all, or called for but very short sessions. In the meantime, the fall of the governmental organization was daily becoming more imminent. Under these circumstances, even the most moderate Octobrists in the Lower Chamber of the State Duma, and even the conservative elements in the Imperial Council (more than half were members appointed by the Czar himself), realized the necessity of abolishing the abominable system which made it possible for a corrupt individual like Suchomlinoff to occupy the post of Minister.

It was under such circumstances, in 1915, that the idea was formulated of creating a progressive faction of members of both legislative chambers. Those approving of this idea held their first session at the

house of the late Maxim Kovalevsky, one of Russia's most prominent historians. At this session, P. Miliukoff outlined for the Assembly a long list of liberal reforms. The conservative element, however, was so strong in this Assembly that even a favorable solution of the Jewish question met with some opposition. "We are well aware" they said, "of the injustice of the Jewish oppression, but it will be almost impossible to convince our common people, not all of whom are sufficiently educated." However, due to the energy of Prof. Miliukoff, all these conflicting elements were united on a moderately liberal program.

The answer to this action was the dismissal of the Duma and the Council and the withdrawal of permission of the congresses of Zemstvos and Municipalities in Moscow to assemble. The government now reached its last stage. At the head of the government there appeared men known not only to be reactionary, but actually suspected of treachery. The climax was reached when Sturmer was appointed to the double post of Prime Minister and Minister of Foreign Affairs. The President of the Duma, M. V. Rodzianko, wrote to the Czar, explaining to him the disastrous effect the appointment of Sturmer, a man of German descent and sympathies, would have on the public opinion of the country. This letter, however, was never answered.

The moment it became evident that it was Sturmer's intention to find out the lay of the land in order to achieve a separate peace with Germany, all parties, including the liberal, moderate, and the most conservative elements in Russia, united in opposition. Pointed speeches against the government were delivered, not only by P. N. Miliukoff, but also by B. M. Purichkevitch, a member of the reactionary union of the Russian people and even by members of the Imperial Council.

Under the pressure of agitation, the government was forced to yield. Sturmer was dismissed. His place as the President of the Council of Ministers was taken by A. F. Trepoff, a conservative, who had the reputation of being entirely devoted to the interests of Russia. But within thirty days Trepoff was compelled to resign and to his place was appointed Prince Golizin, a conservative of no distinct policies.

The Minister of Interior, Protopopoff, a malignant maniac who was incurring the hatred of the whole country, remained the ruling spirit of the government. At a meeting of political leaders at which Protopopoff was present, Deputy A. I. Shingareff, the present Secretary of Agriculture, concluded his speech to Protopopoff with the words: "Go to bed and lie down. Calm yourself, you are ill." Shingareff's

words were very soon understood by all Russia, for it was clear to everybody that the guidance of Russia in its most critical period of life had been put into the hands of an insane man.

Some members of the government felt the impossibility of being associated with Protopopoff, but the Csar prevailed upon them, against their wishes, to retain their places. Thus, all Russia was united in the conviction that it was impossible to leave the control of affairs any longer in the same hands, and that Russia's only hope lay in the Duma.

On February 14, 1917, the Duma was called for a new session. By this time it had the approval of the Imperial Council, some of the Ministers and seventeen members of the Imperial family. Again words of warning and rage addressed to the government rang out in the State Duma. The answer to these clamors was an order proroguing the Duma. But this time the Duma refused to abide by the Imperial orders. N. V. Rodzianko, at the head of the Executive Committee of the Duma, sent out information to all parts of the country declaring the existence of the new order of things. The Csar, realizing the situation when it was too late, signed the Act of Abdication in favor of Grand Duke Michael. The latter declined to accept the throne, and left all power to the Provisional Government appointed by the Executive Committee of the Duma. The Acts of Abdication of Csar Nicholas and Grand Duke Michael were brought by the Secretary of Justice, A. F. Kerensky, to the Senate. These were published by the Senate without question and were placed in safe custody to be kept as historic documents of utmost importance. From this moment a new era began for Russia.

IN MEMORIAM

JOSEPH H. CHOATE

On May 14, 1917, the Honorable Joseph H. Choate suddenly died, in the full possession of his great and splendid powers and in the performance of his civic duties. Born in Salem, Massachusetts, on January 24, 1832, he had rounded out more than the full three score years and ten, without losing interest in life and without finding the years weighing heavily upon him. By birth and ancestry he was of Massachusetts and he added distinction to the Commonwealth. By residence

he was a citizen of New York and greatly added to the distinction of the State of his adoption. He was, above all things, an American, and reflected credit upon the country, both as a citizen and as an Ambassador to Great Britain. Later, at the Second Hague Peace Conference, as Chairman of the American delegation, he upheld American ideals with a grace, a dignity, and a persuasiveness which gave him an international standing which time can only preserve.

It is stated that Mr. Choate was, at the time of his death, engaged in the performance of his civic duties. From the outbreak of the war of 1914 he felt very keenly that the United States should not only manifest sympathy for the Allied cause, but that the United States should exert force, if necessary, in order to maintain its rights against the unlawful attacks of the Imperial German Government, and that the United States should, in view of all the circumstances, unite itself with the Allies in defense not merely of the freedom of the seas but of the liberty of the world. He welcomed President Wilson's appeal to Congress and the declaration of the existence of a state of war by that body against the Imperial German Government. The events of the past two years and more had drawn him largely from the retirement to which his years and his labors had justly entitled him. He spoke from the platform in favor of preparedness, he lent the weight and dignity of his name to organizations calculated to advance the cause of preparedness. He welcomed, as New York's most distinguished citizen, the British Commission to the City of New York, and on the very morrow of the day on which he died he was to have addressed the students at Columbia University on the war and as to the duties which they should perform.

It was not the first time that Mr. Choate had welcomed distinguished visitors to the city of his adoption; and it seems almost beyond the span of a single life, and it shows how early Mr. Choate achieved distinction, when it is recalled that in 1860 he was chairman of that meeting at Cooper Hall where Abraham Lincoln, soon to be nominated for the Presidency, first spoke to his fellow countrymen in the East. A leader of the bar, as long as he cared to lead it, Chairman of the Convention of 1894 which revised the Constitution of the State of New York, Mr. Choate held, as it were, his position in trust to the cause of justice and his leisure at the disposal of every good cause. He took a citizen's interest in public questions and served his country when called upon without forcing himself upon his countrymen. Americans

were proud of, and Englishmen will long remember, his services as Ambassador to Great Britain, where his handsome person, his magnificent presence, his charm of speech as well as of manner, his unaffected and sparkling wit, endeared him in public and private, not only to the members of his profession — who honored him, as never an American before, by electing him a bencher of Lincoln Inn — not only to the statesmen of England with whom he came into official contact, but also to the people of England, to whom he represented the intelligence of the United States.

Greater could no man be than Mr. Choate at The Hague, and in no sphere and on no occasion did his great and splendid talents display themselves to greater advantage. He read but he did not speak French, and the eye was more accustomed to it than the ear. Nevertheless he followed the proceedings of the Conference; a few slight suggestions as to the course of the proceedings enabled him to grasp them in detail, so that, although he spoke frequently and on the spur of the moment and entered into details, he never misunderstood or misstated an address to which he replied in English. The addresses which he himself delivered during the Conference are models of public speech, strong yet graceful, dominant yet persuasive. There is nothing finer in the Conference than the following pointed reference to Baron Marschall von Bieberstein, the first German Delegate, who professed his love for arbitration in private but flouted it in public.

I should like to say a few words in reply to the important discourse delivered by the First Delegate of Germany, with all the deference and regard to which he is justly entitled because of the mighty empire that he represents, as well as for his own great merits and his unfailing personal devotion to the consideration of the important subjects that have arisen before the conference. But with all this deference it seems to me that either there are, in this conference, two First Delegates of Germany, or, if it be only the one whom we have learned to recognize and honor, he speaks with two different voices. Baron Marschall is an ardent admirer of the abstract principle of arbitration and even of obligatory arbitration, and even of general arbitration between those whom he chooses to act with, but when it comes to putting this idea into concrete form and practical effect he appears as our most formidable adversary. He appears like one who worships a divine image in the sky, but when it touches the earth it loses all charm for him. He sees as in a dream a celestial apparition which excites his ardent devotion, but when he wakes and finds her by his side he turns to the wall, and will have nothing to do with her.

Mr. Choate came into the world bearing a great name, to which he added dignity, luster, and affectionate regard. Like his kinsman,

Rufus Choate, he was an advocate, and always an advocate, of great, good, and worthy causes. He rarely held office, but he lived and died a public servant.

RICHARD OLNEY

The American Society of International Law lost in the death, on April 8, 1917, of the Honorable Richard Olney, as in the case of Mr. Choate, a Vice-President and an interested member from the date of its foundation. Like Mr. Choate, he was born in Massachusetts (September 15, 1835) and added great distinction to the State of his birth, but, unlike Mr. Choate, he was willing to be the first citizen of his Commonwealth and to lead the bar of his native State, instead of wandering to New York to become the first citizen of New York and the leader of its bar. Like Mr. Choate, he was preëminently a great citizen; again like Mr. Choate, he rarely held a public office, but as Attorney General of the United States he won the confidence and admiration of his countrymen by the bold and unhesitating way in which he advised President Cleveland as to his rights and as to his duty in calling out the army to protect the federal mails in Chicago, and as Secretary of State he won the admiration of his countrymen by his uncompromising attitude in the Venezuelan question, which caused Great Britain to submit that dispute to arbitration — and it is not too much to say that there never was and there could not well be a more efficient Secretary of State than Richard Olney.

Mr. Olney was great in himself and derived and owed nothing to his surroundings. He was a member of the bar, yet hardly of the bar, for he practiced law, as one might say, from the outside. He did not associate on intimate terms with his professional brethren; he rather dwelt apart — entered the court-house as one intent upon business, and did not linger when the work was done. He did not build up a large firm of which he was the head and whose numerous members acted in accordance with his slightest suggestion. His law firm consisted of Richard Olney, the brain of this firm was Richard Olney, and there was hardly a book, bound in sheep or calfskin, to suggest that Richard Olney needed aid of other men. Quiet, reserved, dignified, sparing of speech, firm in his views, dominated by the strength of his character and by the force of his intellect, he did not charm, he did not

persuade; and yet he could be charming and persuasive on occasion. He compelled attention, and there could be but one master in his presence. The Honorable John W. Foster said all in a single phrase when following him at the first meeting of the American Society of International Law: "What shall the man say who comes after the king?"

JAMES BROWN SCOTT.

THE KRONPRINZESSIN CECILIE AND THE HAGUE CONVENTION VI

The decision in the case of the *Kronprinzessin Cecilie* given by the Supreme Court of the United States on May 7, 1917, may properly call to mind the work of the Hague Conference in 1907. At this Second Conference at The Hague in 1907, the American delegates endeavored to secure by international agreement immunity from capture for merchant vessels at sea on the outbreak of hostilities.

The Conference drew up Convention VI relative to the status of enemy merchant vessels at the outbreak of war. The delegates of the United States, however, did not sign, and the Government of the United States has not ratified this convention. The report of the delegates says of the convention:

At the first reading, the convention seems to confer a privilege upon enemy ships at the outbreak of war. Free entry and departure are provided for, ships are not to be molested on their return voyages, and a general immunity from capture is granted to vessels from their last port of departure, whether hostile or neutral. But all these immunities are conditioned upon ignorance of the existence of hostilities on the part of the ship. This condition forms no part of the existing practice, and it was the opinion of the delegation that it substantially neutralized the apparent benefits of the treaty and puts merchant shipping in a much less favorable situation than is accorded to it by international practice of the last fifty years. * * *

As the freight trade of the world is carried on in steamers which habitually carry only enough coal to reach their destination, the operation of the treaty is to render them instantly liable to capture, the alternative being to continue to the hostile destination and surrender. * * *

The effects upon the practice of marine insurance are also important. The ordinary contract does not cover a war risk. The operation of a war risk is simple because its conditions and incidents are fully known. But a policy calculated to cover the contingency of capture, the risk depending upon the chance or possibility of notification, would introduce an element of uncertainty into marine risks which, in view of the interests at stake, should not be encouraged.

The eventualities for which the American delegates endeavored to provide are in part illustrated in the case of the *Kronprinzessin Cecilie*.

This vessel sailed from New York for Bremerhaven via Plymouth on July 28, 1914. She carried among other cargo 93 kegs of gold valued at nearly \$5,000,000. The prepaid freight on this gold was \$9,268. On July 31st, when more than 1000 miles from Plymouth, she turned back and later entered Bar Harbor. Here on August 8th, the shippers, the Guaranty Trust Company of New York, accepted redelivery.

The vessel had turned back on receipt of a code message from the directors: "War has broken out with England, France and Russia. Turn back to New York."

On account of the failure to deliver the 93 kegs of gold, the shippers libeled the vessel, claiming damages of more than one and three quarters million dollars. In the Massachusetts District Court the libel was dismissed "for the reason that the master was justified in his action by the duty imposed upon him under the maritime law." Other cases against the *Kronprinzessin Cecilie* were similarly dismissed. 238 Fed. Rep. 946 (Feb. 1, 1916).

In the Circuit Court of Appeals on November 17, 1916, the decision of the District Court as to the shipment of gold was reversed (Putnam, J., dissenting).

The Supreme Court handed down its opinion on the case brought before it on writ of certiorari on May 7, 1917. Mr. Justice Holmes delivered the opinion of the court, Mr. Justice Pitney and Mr. Justice Clarke dissenting. The question considered was whether the turning back was justified by facts, even though the *Kronprinzessin Cecilie* might possibly have reached her destination had she continued her voyage. The court said:

But if it be true that the Master was not bound to deliver the gold in England at the cost of capture it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the Master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office if not a binding command at least shows that if the Master had remained upon his course one day longer and had received the message it would have been his duty as a prudent man to turn back. But if he had waited till then there would have been a question whether his coal would hold out. Moreover if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared he never is at liberty to anticipate war. In this case the anticipation was correct, and the Master is not to be put in the wrong by nice

calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

The decree of the Circuit Court of Appeals was accordingly reversed.

The doctrine advocated by the United States at the Second Hague Conference in 1907 was that days of grace for enemy merchant vessels should be obligatory. The Conference agreed to a convention expressing the opinion that it was "desirable" that days of grace be allowed for the departure of enemy merchant vessels in port at the outbreak of war, or for enemy merchant vessels which had sailed before the war and entered an enemy port or were met at sea "while still ignorant that hostilities had broken out."

The aim of this convention was shown in the declaration that the forty-four states, in the language of the preamble, were

Anxious to insure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities.

The Supreme Court in its decision as to the carriage of the gold said "neither party to the contract thought that it would not be performed." It would have been, therefore, an operation, in the words of the Hague Convention, "undertaken in good faith and in the process of being carried out before the outbreak of hostilities."

Further, it may be said that Great Britain and Germany had mutually proposed allowance of certain days of grace for merchant vessels of each in the ports of the other at the outbreak of war. No agreement was reached, owing apparently to misunderstanding rather than to intention. France and Germany, France and Austria, and Great Britain and Austria did, however, allow days of grace.

It is true that Italy, Serbia, Turkey, and other states now belligerents did not ratify Hague Convention VI, and that Germany and Russia ratified with reservations. It is also possible that the *Kronprinzessin Cecilie* may not have been entitled to exemptions because by Article 5 of Convention VI "The present Convention does not affect merchant ships whose build shows that they are intended for conversion into war-ships." If not liable under this Article 5, the other Articles of Convention VI would seem to justify the attitude of the Government of the United States in 1907, and the opinion of the

Supreme Court in 1917, that under the existing international agreements and practice the captain of the *Kronprinzessin Cecilie*, in the words of the court, "acted as a prudent man."

GEORGE GRAFTON WILSON.

LESTER H. WOOLSEY, THE NEW SOLICITOR FOR THE
DEPARTMENT OF STATE

On June 27, 1917, Lester H. Woolsey, Esquire, of New York, was appointed Solicitor for the Department of State. His name had previously been sent to the Senate for confirmation and the Senate has duly confirmed the appointment. Mr. Woolsey has entered upon the performance of the duties of the office and it is to be hoped that he will long continue to perform these duties, not merely in his own behalf, but in the interest of the Government, of which he is a faithful and competent, upright and loyal servant.

The duties of the Solicitor are technical. They require a broad knowledge of international law, not merely as found in the books, but in the actual and shifting practice of nations. The Solicitor must be versed in diplomacy, for the questions arise for the most part in diplomatic intercourse. They must be considered in the light of diplomacy; they must be determined with a full knowledge of the aims and purposes of governments, for a suggestion proper enough in theory is often unacceptable or unworkable in practice, and tact as well as law often determines the method and solution. Experience and temperament, judgment and learning, are indispensable for the successful performance of the duties of this office.

Mr. Woolsey possesses these qualities in abundant measure and his appointment is because of their possession, not because of influence in his behalf. He entered the Department of State almost ten years ago as a clerk in the Solicitor's Office, of which he is now the head. He learned at first hand its duties and performed them with skill and devotion. He was appointed Assistant Solicitor in 1913. He was appointed Law Adviser to the Department of State on July 1, 1916, an office especially created for him by Secretary Lansing, and since the outbreak of the European War he has, by his skill and devotion, amply justified the confidence of his chief — to such a degree, indeed, that the Secretary recommended his appointment as Solicitor to the Attorney General, who makes the appointment. In fact, the Solicitor

is an officer of the Department of Justice, though not in name an Assistant Attorney General.

Mr. Woolsey is, as the members of the Society and as the readers of this JOURNAL know, a member and a contributor to the JOURNAL. He has contributed to its columns two admirable papers, one in 1909 on "Early Cases on the Doctrine of Continuous Voyage" — a doctrine with which he was thus fortunately familiar during the European War — and another in 1910 entitled "A Comparative Study of the South African Constitution." Recently he delivered a notable address on "Economic Considerations of International Organization" before the Eleventh Annual Meeting of the Society, which, when it appears in the volume of the proceedings of the Society for 1917, will be regarded as possessing permanent value.

The opportunities of service were never greater than at the present time. The complicated questions of neutrality have given way to the complicated questions of war, and it is a matter of congratulation that the law officer of the Department of State is by natural ability, training, and experience as well fitted to cope with the one as with the other.

JAMES BROWN SCOTT.

THE ANNUAL MEETING OF THE SOCIETY

The Eleventh Annual Meeting of the Society was held in Washington, April 26 to 28 last. The meeting was opened on the evening of the 26th, in the New Willard Hotel, by the Honorable Elihu Root, President of the Society, who, although when he selected the subject of his presidential address several weeks prior to the meeting, he had no idea that he would soon be called upon to head the American mission to the new-born democracy of Russia, delivered a stirring address upon "The Effect of Democracy on International Law." It was a peculiar privilege of the members of the Society that to them Mr. Root made his last public utterance before leaving the United States to stir the Russian peoples and armies to renewed action in defense of democracy and the supremacy of law among nations. The theme of his address, the thought that he left with his fellow-members in the Society, the message that he took with him to the masses of new Russia struggling for liberty against autocracy both within and without their country, was contained in the following concluding passages:

The world cannot be half democratic and half autocratic. It must be all democratic or all Prussian. There can be no compromise. If it is all Prussian, there can be no real international law. If it is all democratic, international law, honored and observed, may well be expected as a natural development of the principles which make democratic self-government possible.

The democracies of the world are gathered about the last stronghold of autocracy, and engaged in the conflict thrust upon them by dynastic policy pursuing the ambition of rulers under claim of divine right for their own aggrandizement, their own glory, without regard to law or justice, or faith. The issue today and tomorrow may seem uncertain, but the end is not uncertain. No one knows how soon the end will come, or what dreadful suffering and sacrifice may stand between; but the progress of the great world movement that has doomed autocracy cannot be turned back, or defeated.

That is the great peace movement.

There the millions who have learned under freedom to hope and aspire for better things are paying the price that the peaceful peoples of the earth may live in security under the protection of law based upon all embracing justice and supreme in the community of nations.

The presidential address was followed by two papers on "The Status of Armed Merchantmen," the first by the Honorable Chandler P. Anderson, formerly Counselor to the Department of State, and the second by Mr. Ellery C. Stowell, Associate Professor of International Law in Columbia University in the City of New York. The subject was informally discussed by Mr. Maurice Leon, of the New York Bar. A pleasing feature of the opening session was the receipt of cabled greetings and best wishes from Mr. Antonio S. de Bustamante, President of the Cuban Society of International Law. An appropriate acknowledgment was sent by the Society on the following day.

On Friday morning, April 27th, the Society considered the question of "Attacks upon Enemy Merchant Vessels." The subject was opened with a paper by Mr. Charles Cheney Hyde, of the Chicago Bar, Professor of International Law in Northwestern University. It was informally discussed by Mr. Everett P. Wheeler, of the New York Bar. This was followed by a consideration of "Some Economic Aspects of International Organization." Mr. Lester H. Woolsey, the newly appointed Solicitor for the Department of State, led this subject with a prepared paper, and was followed by informal remarks from Professor Philip Marshall Brown, of Princeton University, Rear Admiral Colby M. Chester of the U. S. Navy, Mr. Charles Noble Gregory, of the Bar of the District of Columbia, Mr. Denys P. Myers, of the World Peace Foundation, Boston, Mass., Professor George G. Wilson, Pro-

fessor of International Law in Harvard University, Mr. Walter S. Penfield, of the Bar of the District of Columbia, Mr. James Brown Scott, Special Adviser to the Department of State, Mr. Bernard C. Steiner, of Baltimore, Md., and Mr. Charles S. Brand, of the New York Bar. At this session, the Society unanimously adopted the following resolution, upon motion of Mr. Sterling E. Edmunds, of the St. Louis Bar:

Whereas, the legal training of those of our citizens in military and international law is peculiarly necessary in this war, which is essentially one for the vindication of law; and,

Whereas, the usual educational facilities of the Government of the United States may not be adequate to so large an added task; therefore, be it

Resolved, that the American Society of International Law offers to the Government of the United States the services of its members as instructors in such branches of law in any manner in which their services may be desired.

In the afternoon of the same day, the question of international organization was further discussed. Mr. Raleigh C. Minor, Professor of International Law in the University of Virginia, delivered an address on the legislative aspects of the subject, and Mr. Charles G. Fenwick, Associate Professor of Political Science in Bryn Mawr College, read a paper on judicial international organization. In the informal discussions of these subjects which followed, the following members took part: Senator Henri LaFontaine, of Belgium, Mr. Theodore P. Ion, of Washington, D. C., Mr. Denys P. Myers, of Boston, Mass., Dr. David Jayne Hill, of Washington, D. C., Mr. Arthur G. Hays, of New York City, Mr. Justice Russell, of the Supreme Court of Nova Scotia, Rear Admiral Colby M. Chester, U. S. Navy, Mr. Edward C. Eliot, of St. Louis, Mo., and Mr. James Brown Scott, of Washington, D. C.

The consideration of the question of International Organization was continued at the evening session of the same day. The executive and administrative features of such organization were discussed in papers presented by Mr. William C. Dennis, of the Bar of the District of Columbia, and Mr. James Brown Scott, Director of the Division of International Law of the Carnegie Endowment for International Peace. After an address by Dr. Alejandro Alvarez, of Chile, Secretary General of the American Institute of International Law, upon "America and the Future Society of Nations," the previous question of executive and administrative international organization was discussed from the floor by Mr. Chester DeWitt Pugsley, of New York, Mr. Theodore P. Ion,

Mr. Soterios Nicholson, of Washington, D. C., Mr. Arthur G. Hays, Senator Henri LaFontaine, and Professor Stanley K. Hornbeck, of the University of Wisconsin.

The session on Saturday morning, April 28th, was opened with an address by Senator Henri LaFontaine, of Belgium, upon the subject of "The Neutralization of States in the Scheme of International Organization." This was followed by a paper on the same subject by Mr. Cyrus F. Wicker, of the New York Bar, formerly of the American diplomatic service. The subject was then thrown open for discussion from the floor, and the following members took part: Dr. David Jayne Hill, Mr. Theodore P. Ion, Senator LaFontaine, Mr. Denys P. Myers, Mr. Nelson Gammans, of the New York Bar, Rear Admiral Colby M. Chester, and Mr. Theodore N. Van Derlyn, of Switzerland.

At the business meeting which followed the discussion Saturday morning, the Society reelected the president, vice-presidents, and retiring members of the Executive Council. To fill the vacancy in the vice-presidents caused by the death of the Hon. Richard Olney, Hon. Simeon E. Baldwin was elected. The Honorable James L. Slayden was elected to fill a vacancy in the Executive Council. The Committee on the Study and Teaching of International Law and Related Subjects made a final report and was, upon request, discharged. The Committee on the Codification of International Law had been continued by vote of the Society on Friday evening. A resolution expressing its great sense of loss in the death of the Honorable Richard Olney, a member and Vice-President of the Society since its foundation, was unanimously adopted.

The Executive Council met immediately upon the adjournment of the Society, and reelected the Chairman of the Council, the members of the Executive Committee, the Treasurer, the Recording and Corresponding Secretaries, and the Assistant to the Secretaries. The Board of Editors of the American Journal of International Law was likewise continued without change. The Council also continued the membership of the Standing Committee on Selection of Honorary Members, which made no recommendation for the present year, and the Standing Committee on Increase of Membership, except the chairman of the latter, — Mr. Scott having requested that he be allowed to withdraw, and Mr. Oscar S. Straus was appointed in his place. The Committee on the Annual Meeting was likewise continued, with one change, namely, Mr. George G. Wilson withdrew and Mr. Breckinridge Long,

Assistant Secretary of State, was elected. The Committee on Publication of Proceedings was discontinued and these duties assigned to the Editor-in-Chief and Secretary of the Board of Editors of the JOURNAL.

The meeting closed with the annual banquet at the New Willard Hotel on the evening of the 28th. Eighty-five members and guests were present. In the absence of President Root, who had left the city to prepare for his important public errand to Russia, the Honorable David Jayne Hill presided as toastmaster. In his remarks opening the speaking of the evening, Dr. Hill took occasion to reply to those who assert that international law has been destroyed. In answer to this statement he remarked:

International law can never be destroyed; it may be violated; its rules may be disobeyed, but so may the rules laid down by municipal law, or by any legal system; but the law is there, and, so far as it goes, so far as it is the expression of that justice toward which all law aspires, it is a reality, in spite of violations. There is an analogy which has often impressed me, between the jurist and the man of science, who is exploring the arcana of nature with the idea of discovering the truth. There is not a scientific text-book in the world ten years old that is fit to teach in school or college today; and so, when we find that our international law books are already uncertain and will have to be revised, this should not in the least shake our faith in the reality and the solidity of the law. The search for justice is, to the jurist, what the search for truth is to the physicist, the psychologist, and the historian. Let me say, with the strongest possible emphasis, gentlemen, that so long as the idea and the ideal of justice persists in the human mind — and it will never cease to persist — there will be international law.

The speakers were Mr. Justice Russell, of the Supreme Court of Nova Scotia, Hon. Oscar S. Straus, M. Frederic Allain, in charge of the legal department of the French Purchasing Commission in the United States, Hon. Sheldon Amos, Judge of the Egyptian Mixed Court, and Professor B. E. Shatsky, of the University of Petrograd.

The complete addresses delivered during the meeting and at the banquet, together with the discussions, will appear in the Proceedings now in press and shortly to be issued.

GEORGE A. FINCH.

JUDGE ADVOCATES IN THE ARMY

On June 15, 1917, the War Department announced the selection from civil life of twenty Judge Advocates, to serve with the first levy of approximately 600,000 men of the national draft army. It was stated that each of the Judge Advocates would be assigned to a division

of the Army and that all of them would be Majors on the staff of the Judge Advocate General in the field. Those appointed were:

Henry L. Stimson, ex-Secretary of War, who has been assigned to duty for the present at the Army War College; Professor Eugene Wambaugh and Professor Felix Frankfurter, both of the Law Faculty of Harvard; Dr. James Brown Scott, a leading authority on international law; Professor John H. Wigmore, Dean of Northwestern University; Gaspar G. Bacon, son of Robert Bacon, former Ambassador to France; Frederick Gilbert Bauer of Boston; George S. Wallace of Huntington, W. Va.; Nathan W. McChesney of Chicago; Lewis W. Call of Garrett, Md.; ex-Congressman Burnett M. Chipperfield of Chicago; Joseph Wheless of St. Louis; George P. Whitsett of Kansas City; Victor Eugene Ruehl of New York; Thomas R. Hamer of St. Anthony, Idaho; Joshua Reuben Clark, Jr., of Washington; Charles B. Warren of Detroit; Arthur C. Black of Kansas City; Edwin C. Davis of Boise, Idaho, and Hughe Bayne of New York.

The Committee on Public Information issued the following statement in connection with the announcement of the appointment of the Judge Advocates:

The men who have sought appointment have been so highly qualified — and many of them have been so distinguished in the law — that it has been hard at times to select a few from so much good material.

It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the army are looking for a "snap" or for a "silk stocking" position far in the rear of the actual fighting. The officers acting on the staff of the Judge Advocate General will be members of the actual fighting force, and, in the pursuit of duty, will be brought into the danger zone just as often as other specialized commissioned men, medical officers, for instance. The large percentage of casualties among army doctors fighting in France will stand as a convincing argument that military surgeons are not spared when the general assault begins.

A great many distinguished lawyers and legal professors, men of national standing, applied to the Judge Advocate's Department early after the declaration of war and even before the President's final word was read. They were eager to act as soldier, lawyer, or to accept any post where there was a chance to offer themselves to their country. After a painstaking weeding out several Majors were created.

It is not the purpose of the present note to comment or to criticize the appointments, but rather to call attention to the fact that many of the appointees are members of the American Society of International Law and to express, on behalf of the Society, the satisfaction that its members are offering their services in the line of their profession for such use as the Government may care to make of them; and it may perhaps be proper to remark in this connection that the President of the United States is a regular, not an honorary, member of the Society,

that the Secretary of State is not only a member but a founder of the Society and an editor of its JOURNAL, and that the Judge Advocate General of the Army is likewise a member of the Society. It is peculiarly fitting that the persons appointed from civil life to Judge Advocates should be versed in international law, because, in our Army, the Judge Advocate General advises the War Department as to the laws of war, and the Judge Advocate of each division will be called upon to express his opinion as to the laws of war; for in the conception of the United States the laws and customs of war are not national but international.

JAMES BROWN SCOTT.

THE PORTO RICAN ASSOCIATION OF THE UNITED STATES OF AMERICA

Among the many societies of a quasi-international nature which are daily organized in this country, the Porto Rican Association of the United States of America, which has just been founded in Washington for the specific purpose of "fostering and stimulating in the United States of America, and especially in the capital city thereof, as the seat of the Government, a warm interest in Porto Rico, which may give rise to the establishment of closer bonds of friendship and culture between Porto Ricans and Americans and thereby tend to solve beneficially and definitively the legal and political status of the Island," has a claim to a friendly welcome and support by the American people.

In view of the present conditions in the world, and of the recent passage of the so-called Jones-Shafroth Act "to provide a civil government for Porto Rico," which was printed in the Supplement to this JOURNAL for April, 1917, p. 66, it becomes interesting to examine the present legal and political status of the island in order to ascertain with some sort of accuracy, what the real aims and purpose of this association are.

As it is well known, the island was ceded by Spain to the United States as a result of the Spanish American War, and Congress, after some hesitation as to the disposition which should be made of the island, passed the so-called Foraker Act as a temporary measure to provide a form of civil government for the island. When the question of the status of Porto Rico came up for decision by the Supreme Court in the so-called Insular Cases, it decided under this law by a divided court, that while Porto Rico was not a foreign country for international purposes, yet, in the constitutional sense it was no part of the United

States, but territory belonging and appurtenant thereto. As to the status of the inhabitants of the island, it was held that the Porto Ricans were not aliens within the meaning of the immigration laws, and although there is not a decision precisely in point upon the subject, it was taken for granted, by reason of the many *dicta* in the Insular Cases, that Porto Ricans were not citizens of the United States. As Congress, whether from neglect or legislative slowness, did not see fit further to legislate on this subject until the recent passage of the Jones-Shafroth Act, the island and its inhabitants went along courageously and hopefully laboring for over eighteen years under a law which, though wise as a temporary measure, was quite unjust and unsatisfactory for a number of reasons, among which were the very conditions which it had brought about regarding the status of the island and of the Porto Ricans.

The Jones-Shafroth Act has fixed the status of Porto Ricans by extending to them the privilege of citizenship. It also extends to the island a large measure of self-government, for which the Porto Ricans will, no doubt, show themselves to be fully prepared. But, so far as the status of the island is concerned, the new law leaves it in the same condition as before; that is to say, in the uncertain position of a piece of territorial property belonging and appurtenant to the United States. This is so probably because Congress is not quite sure as yet of the ultimate disposition to be made of the island.

The Porto Rican Association aims to fill this void in the relations between Porto Rico and the United States, and for this purpose it proposes to collect and distribute, judiciously and as far as possible, trustworthy information of all sorts concerning Porto Rico, which may be calculated to spread in this country a greater knowledge of the island and its inhabitants and dispel mutual errors and misconceptions. For this purpose, it will invite the coöperation of the Government of Porto Rico and the Bureau of Insular Affairs at Washington, and of all institutions, persons and corporations, whether Porto Rican or American, as may be best qualified to render valuable assistance to the association. It will also invite men of distinction in the various professions to lecture in this country upon selected Porto Rican topics of interest to the American people; publish a journal in English and Spanish as the official organ of the Association, and issue from time to time such publications as may be advisable or necessary fully to accomplish its aims. It hopes to open in Washington a Porto

Rican library of books, periodicals and other publications of a literary, scientific, historical and statistical interest relating to Porto Rico, as well as rooms for the exhibition of natural, industrial and artistic products of the island. The association will be extended throughout the United States by means of branch associations to be established in as many cities of the Union as possible, and it will take such other measures and establish and carry out as far as possible such other means and initiatives as may be deemed to contribute toward the success of its labors and the realization of its purposes.

This is an ambitious program on the part of the friends of Porto Rico in the United States, and notwithstanding its largeness and the difficulty of carrying it into effect, all citizens of the United States will wish it success, for the people of Porto Rico are our fellow-countrymen and our fellow-citizens, and whatever inures to the advantage of one section inures to the advantage of all; whatever helps the good people of Porto Rico by so much helps the citizens of the United States.

JAMES BROWN SCOTT.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Cd.*, Great Britain, Parliamentary Papers; *Clunet*, J. de Dr. Int. Privé, Paris; *Current History* — Current History — A Monthly Magazine of the New York Times; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletín de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; *M.*, Magazine; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Belgium, Moniteur belge; *Martens*, Nouveau recueil général de traités, Leipzig; *Q. Quarterly Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

December, 1916.

- 12 ALBANIA. The Entente Allies proclaimed the independence of Albania, with Koritza as the capital. Italy proclaimed the independence of Albania at Periti. *Current History*, 6 (pt. 2), 87.

January, 1917.

- 9 GERMANY. Imperial Order issued making changes in contraband list. Texts; *London Gazette* No. 30011.
- 25 ITALY. Italy acceded to the convention of Nov. 9, 1914, between Great Britain and France relative to prizes captured during the present war. English and Italian texts: *G. B. Treaty Series*, 1917, No. 6.

February, 1917.

- 10 AUSTRIA-HUNGARY. Informed neutral Powers that armed merchantmen will be treated as warships. and asked that neutral citizens be warned not to trust their lives and property to such ships. *N. Y. Times*, Feb. 11, 1917.

- 11 ABYSSINIA. Zeodita, the granddaughter of King Menelik, succeeded to the throne of Abyssinia as empress. *Times*, April 3, 1917; *N. Y. Times*, May 26, 1917.
- 15 UNITED STATES. The Secretary of State announced that the Government of the United States considers that commercial vessels have the right to carry arms in self-defense. *N. Y. Times*, Feb. 16-17.

March, 1917.

- 2 FRANCE-SWEDEN. Ratifications exchanged of convention for the protection of trade-marks signed Jan. 31, 1916. *J. O.*, 1917: 2213.
- 2 AUSTRIA. Replied to the American note of Feb. 18, stating the position of Austria on the submarine issue. *Text issued by the Dept. of State.*
- 9 NICARAGUA—SALVADOR. Central American Court of Justice decided in favor of Salvador in the case brought by Salvador to test the right of Nicaragua to lease territory in the Gulf of Fonseca. *Anales de la corte de Justicia Centroamericana*, 6:96.
- 15 UNITED STATES—COLOMBIA. The treaty settling the dispute between Colombia and the United States relative to Panama withdrawn from the Senate. *Congressional Record*, March 15, 1917.
- 20 GERMANY. Hospital ship *Asturias* sunk. *London Times*, (weekly ed.) March 20, 1917.
- 30 GERMANY. Hospital ships *Saita* and *Gloucester Castle* sunk; *Current History*, 6: 442.

April, 1917.

- 2 UNITED STATES. Congress convened. The President made an address regarding relations with Germany. Text: *Cong. Record*, 55:2.
- 2 UNITED STATES. American armed steamer *Aztec* sunk. *N. Y. Times*, April 3, 1917.
- 4 UNITED STATES. The Senate passed a resolution declaring a state of war to exist between the United States and Germany. *Cong. Record*, 55:182.
- 5 UNITED STATES. Executive Order issued announcing defensive zones around coasts of United States. *Text issued by Dept. of State*; *N. Y. Times*, April 14, 1917.

- 6 UNITED STATES. The House of Representatives passed a resolution declaring a state of war to exist between the United States and Germany. The President signed the resolution. *Cong. Record*, 55:242; *Public Resolution* No. 1. 65th Cong. 1st sess.
- 6 UNITED STATES. President issued proclamation of state of war with Germany and regulations governing alien enemies. Text: *Proclamation* No. 1364.
- 6 UNITED STATES. Proclamation relative to German insurance companies doing business in the United States. *Proclamation* No. 1366.
- 6 UNITED STATES. German-owned vessels seized. Ninety-one such vessels were in the ports of the United States. Eleven hundred Germans from the ships were interned. *N. Y. Times*, April 7, 1917.
- 6 BOLIVIA — UNITED STATES. Bolivia replied to the American note announcing declaration of a state of war against Germany. Spanish text: *La Prensa* (Buenos Aires), April 7, 1917.
- 6 COLOMBIA — UNITED STATES. Colombia replied to the American note announcing declaration of a state of war against Germany. Spanish text: *La Prensa* (Buenos Aires), April 7, 1917.
- 7 PANAMA. The President of Panama signed proclamation pledging aid of Panama to the United States in the war with Germany. The exequaturs of German consuls were canceled. Text: *N. Y. Times*, April 8, 1917.
- 7 CUBA — GERMANY. Cuban Senate and House of Representatives unanimously passed the bill declaring a state of war to exist with Germany. The bill was signed by the President. German ships in Cuban waters were seized. *B. O. de la Sec. de Estado* (Cuba) 14: 211. *N. Y. Times*, April 8, 9, 1917.
- 7 ARGENTINE REPUBLIC — GERMANY. Germany protested against the action of Argentine Republic in placing German ships under an armed guard. *N. Y. Sun*, April 20, 1917.
- 8 CUBA — GERMANY. German minister to Cuba handed passports. *N. Y. Times*, April 9, 1917.
- 8 GERMANY. Germany issued warning to mariners not to approach places from which attacks may be made or roadsteads from which embarkation of troops may be made, as mines have been sown in such places. Text: *Issued by the Department of State*.

- 8 AUSTRIA-HUNGARY — UNITED STATES. Austria handed passports to the American chargé. On April 9, the Austrian chargé at Washington applied to the Department of State for passports. *Text of notes issued by the Department of State.*
- 8 Death of Richard Olney, Vice President of the American Society of International Law and former Attorney-General and Secretary of State of the United States. *N. Y. Times*, April 10, 1917.
- 9 GUATEMALA. Martial law declared in Guatemala. *N. Y. Times*, April 11, 1917.
- 10 URUGUAY. Announced neutrality in the war between Germany and the United States and Germany and Cuba. Spanish texts: *B. del Min. de Rel. Ext.* (Uruguay), 5:268.
- 10 MEXICO — UNITED STATES. Mexico replied to the American note announcing declaration of a state of war with Germany. *N. Y. Times*, April 11, 1917.
- 10 CHILE. Announced neutrality in the war between the United States and Germany. *El Diario Illus.* (Santiago de Chile), April 11, 1917.
- 10 ARGENTINE REPUBLIC. Announced neutrality in the war between the United States and Germany, but pledged support of the United States in the position with reference to Germany. Spanish text: *La Prensa* (Buenos Aires), April 11, 1917; English text: *Buenos Aires Herald*, April 11, 1917.
- 11 BRAZIL — GERMANY. Brazil broke off diplomatic relations with Germany. The German minister left Rio de Janeiro April 27. Portuguese text of note: *Jornal do Commercio*, April 12, 1917.
- 12 COSTA RICA. Costa Rica offered use of ports of Costa Rica for American ships. Text: *N. Y. Times*, April 13, 1917.
- 12 GERMANY — UNITED STATES. Germany announced that Americans in Germany would not be interned. *N. Y. Times*, April 13, 1917.
- 13 BOLIVIA — GERMANY. Bolivia handed passports to the German minister with note breaking off diplomatic relations. Spanish text: *B. del Min. de Rel. Ext.* (Uruguay), 5:296.
- 13 ARGENTINE REPUBLIC. The Argentine ship *Monte Protegido* sunk. Spanish texts of notes exchanged between Argentine Republic and Germany: *La Prensa* (Buenos Aires), April 22, May 2, 1917; English texts: *Buenos Aires Herald*, May 3, 1917.

- 14 AUSTRIA-HUNGARY — UNITED STATES. American chargé left Vienna. *N. Y. Times*, April 16, 1917.
- 15 FRANCE — UNITED STATES. French decree signed appointing a high commission to the United States. *J. O.*, 1917: 3004.
- 15 UNITED STATES. The President issued an appeal to the people to serve together. Text: *N. Y. Times*, April 16, 1917.
- 17 UNITED STATES — MEXICO. Ignacio Bonillas, the first Mexican Ambassador to be received by the United States since the death of President Madero of Mexico, presented his credentials to the President and was formally accepted as diplomatic representative from Mexico. *N. Y. Times*, April, 19, 1917.
- 18 HUNGARY. Count Tisza resigned as Premier of Hungary and Count Esterhazy was appointed. *N. Y. Times*, April 19, 1917.
- 18 SPAIN. Marquis Manuel Garcia Prieto, President of the Senate, formed new cabinet. List of members: *N. Y. Sun*, April 20, 1917.
- 19 NICARAGUA. Replied to American notice of the state of war with Germany and expressed sympathy, but made no mention of neutrality. *N. Y. Times*, April 20, 1917.
- 19 NETHERLANDS. Proclaimed neutrality in war between Germany and the United States and Germany and Cuba. Dutch text: *Staatscourant*, April 19, 1917.
- 20 SPAIN — GERMANY. Spain presented note to Germany protesting against the sinking of the *San Fulgencia* and asking definite statement as to submarine policy. Text: *London Times* (weekly ed.), April 27, 1917.
- 20 GREAT BRITAIN — PORTUGAL. Great Britain rented German ships from Portugal. *N. Y. Times*, April 21, 1917.
- 21 TURKEY — UNITED STATES. Turkey announced the breaking off of diplomatic relations with the United States. American Ambassador Elkus, who was ill, was allowed to remain. He left Turkey June 1. *N. Y. Times*, April 22, June 4, 1917.
- 21 GREAT BRITAIN — UNITED STATES. A high commission headed by Hon. A. J. Balfour left England April 11 and arrived in the United States May 21. *Current History*, June, 1917.
- 22 ARGENTINE REPUBLIC. Invited South American nations to hold a conference to formulate a common policy with respect to the war. On July 12, it was announced that the Congress was postponed indefinitely. *Washington Post*, July 12, 1917

- 22 GERMANY. The International Red Cross Committee has addressed a note to the German Government referring to the German order issued on January 29 regarding hospital ships and to the torpedoing of hospital ships *Astoria*, *Britannic* and *Gloucester Castle*. *London Times* weekly ed., April 27, 1917.
- 23 FRANCE. France announced that German prisoners would be embarked on hospital ships owing to the German order of January 29 relative to the torpedoing of hospital ships. *London Times* weekly ed., April 27, 1917.
- 24 FRANCE. French high commission headed by Marshal Joffre and M. Vittiani arrived at Hampton Roads. *Current History*, June, 1917.
- 25 CHILE—BOLIVIA. Chile replied to the Bolivian notification of breaking off of diplomatic relations with Germany. Spanish text: *La Prensa* Buenos Aires, April 26, 1917.
- 26 GREAT BRITAIN. Admiralty Notice to Mariners No. 434 issued canceling No. 319, cautioning against dangerous areas in the North Sea except Danish and Netherland waters. *London Gazette*, No. 30037.
- 27 BOLIVIA—URUGUAY. Following treaties announced in process of negotiation: 1. Amplification of treaty relative to legal procedure, letters rogatory, etc.; 2. General obligatory arbitration; 3. Exchange of titles, and cabotage. *D. O. (Uruguay)*, May 24, 1917; *La Prensa* (Buenos Aires) April 27, 1917.
- 28 BRAZIL. Announced neutrality in the war between Germany and the United States. On May 29, the House of Representatives passed a bill revoking this declaration and authorized the President to seize German ships. *N. Y. Times*, May 1, 30, 1917.
- 29 GUATEMALA—GERMANY. The National Assembly approved decree issued by President breaking off diplomatic relations. Passports were handed the German Minister, with eight days' notice to leave Guatemala, and the Guatemalan Minister to Germany was recalled by cable. *N. Y. Times*, April 29, 1917.
- 30 GREECE. Greek chargé at Washington issued statement explaining position of Greek Government. *N. Y. Times*, May 1, 1917.
- 30 ARGENTINE REPUBLIC—BOLIVIA. Argentine Republic replied to the Bolivian notification of the breaking off of diplomatic relations with Germany. Spanish text: *La Prensa* Buenos Aires, May 1, 1917.

May, 1917.

- 1 RUSSIA. Formal declaration made by the new cabinet that no separate peace would be made with Germany. Text: *N. Y. Times*, May 4, 31, 1917.
- 1 MEXICO. Venustiano Carranza took oath of office as President of Mexico, the first constitutional executive in four years. *D. O. (Mexico)*, May 2, 1917.
- 2 BRAZIL. Dr. Lauro Müller, Minister for Foreign Affairs, resigned. Dr. Nils K. Pecanha was appointed in his place. *Journal do Commercio*, May 3, 1917.
- 4 GREECE. Entente Ministers presented note to Greek Government requesting reestablishment of Allied control of customs, railways, etc., in accordance with the Allied ultimatum of Dec. 31, 1916. *London Times* (weekly ed.), May 11, 1917.
- 4 RUSSIA. Council of Workmen and Soldiers declared for peace without annexations or indemnities, but voted to sustain the provisional government. *Independent*, May 12, 1917.
- 4 GREECE. New cabinet formed with Premier and Foreign Minister Alexander Zaimis. List of members: *N. Y. Times*, May 5, 1917.
- 4 AUSTRIA-HUNGARY — UNITED STATES. Count Adam Tarnowski sailed from New York with safe conduct from the Entente Allies. *N. Y. Times*, May 5, 1917.
- 5 UNITED STATES. The President signed bill allowing foreign governments to enlist their nationals in the United States. *Public Act No. 10*. 65th Cong. 1st sess.
- 5 ROUMANIA. Roumanian Chamber of Deputies sent message of congratulation to the House of Representatives of the United States on the entry of the United States into the war. Text: *Cong. Record*, vol. 55: 1917; *House Doc. 121*, 65th Cong. 1st sess.
- 7 KRONPRINZESSIN CECILE. The United States Supreme Court held that the captain of the ship was justified in putting back on the eve of war. The suit was brought by the Guaranty Trust Company for \$2,240,000 damages for failure to deliver at Plymouth and Cherbourg \$11,000,000 in gold consigned by the Trust Company to its representatives in England and France. *U. S. Supreme Court Reports*, vol. 243.
- 7 BOLIVIA. José Nestor Gutiérrez, Minister of War, elected Presi-

- dent of Bolivia, succeeding Gen. Ismael Montes. *N. Y. Times*, May 8, 1917.
- 8 GERMANY — UNITED STATES. German Admiralty announced that the *Healdton* was sunk by a German submarine. *N. Y. Times*, May 9, 1917.
- 9-10 ITALY. Italian High Commission headed by Enrico Erlotta, Minister of Transportation, and Prince Udine, arrived in New York. *N. Y. Times*, May 11, 1917.
- 9 LIBERIA — GERMANY. Liberia broke off diplomatic relations with Germany. *N. Y. Times*, May 10, 1917.
- 9 NICARAGUA — GERMANY. Nicaragua broke off diplomatic relations with Germany. *N. Y. Times*, May 20, 1917.
- 10 GERMANY — BELGIUM. It was admitted in the German Reichstag that Belgian subjects resident of Cologne had been drafted into the German army. The Belgian Minister to the United States protested against this practice in July, 1916. The German Government contended that Belgians resident in Germany five years had lost their Belgian nationality and were subject to the laws of the empire, including enforced military service. *N. Y. Sun*, May 11, 1917.
- 10 RUSSIA. The President of the Duma, M. Rodzianko, in an address to the Duma, declared that Russia would make no separate peace. *N. Y. Times*, May 12, 1917.
- 10 RUSSIA. The Council of Soldiers' and Workmen's Delegates passed a resolution calling for a world peace conference. Text: *N. Y. Times*, May 12, 1917.
- 10 UNITED STATES. Announced by the Navy Department that the first enlisted men to be landed in France after the declaration of war were the armed guard of the *Aztec* sunk April 1. *U. S. Official Bulletin*, vol. 1, No. 4.
- 10 GERMANY — TURKEY. Discussion in the German Reichstag of ten treaties with Turkey to take the place of the capitulations. *N. Y. Times*, May 17, 1917.
- 11 HAITI — GERMANY. Haitian Congress refused to pass resolution declaring war on Germany. A resolution was adopted protesting against the submarine warfare. The President was authorized to break off diplomatic relations with Germany if reparation was not made for the death of Haitians on the French ship *Montreal* which was torpedoed. *N. Y. Times*, May 12, 1917.

- 11 UNITED STATES — RUSSIA. High Commission to Russia announced as follows: Elihu Root, Envoy Extraordinary and Plenipotentiary; Charles Crane, John R. Mott, Cyrus McCormick, Samuel Bertron, James Duncan, Charles E. Russell, Major General Hugh L. Scott, and Rear Admiral James H. Glennon. The commission arrived in Russia, June 13, 1917. *U. S. Official Bulletin*, vol. 1, No. 3, p. 4.
- 11 CHINA — GERMANY. House of Representatives failed to pass the resolution declaring war on Germany. *N. Y. Times*, May 12, 1917.
- 12 UNITED STATES. The President signed the resolution authorizing the President to take over the title for the United States of ships owned in whole or in part by Germans found in ports under American jurisdiction and to put them into service. *Public Resolution No. 2*, 65th Cong. 1st sess.
- 12 SCANDINAVIA. Conference between Sweden, Denmark and Norway ended. Announcement made that the countries would remain neutral. *N. Y. Times*, May 13, 1917.
- 14 UNITED STATES. Additional Executive Order issued announcing defensive zones. *Executive Order*, No. 2597.
- 14 DEATH OF HON. JOSEPH H. CHOATE, Vice-President of the American Society of International Law, and former Ambassador to the Court of St. James. *N. Y. Times*, May 15, 1917.
- 15 GERMANY — RUSSIA. Chancellor Von Bethmann-Hollweg announced in Reichstag Germany's willingness to make a separate and easy peace with Russia. *N. Y. Times*, May 15, 1917.
- 16 CUBA — UNITED STATES. The United States sent note to Cuban Government thanking the government for the support of the Cuban declaration of war against Germany and stating the position of the United States in regard to the present internal troubles in Cuba. Text: *N. Y. Times*, May 17, 1917.
- 16 FRANCE — BRAZIL. French decree passed authorizing the ratification of the convention for the protection of literary, artistic and scientific property signed December 15, 1913. *J. O.*, 1917: 4053.
- 16 RUSSIA. The Premier and Minister for Foreign affairs, Paul Milukoff, resigned from the Cabinet and was succeeded by M. Tereschtenko. List of members of new cabinet: *N. Y. Times*, May 17, 1917.

- 17 HONDURAS — GERMANY. Honduras severed diplomatic relations with Germany. *Washington Post*, May 19, 1917.
- 18 UNITED STATES. The President signed the Army bill designed to raise in one year 1,000,000 men. He also signed the proclamation putting into effect the selective draft provision of the act. *Proclamation*, No. 1370.
- 19 CHINA — GERMANY. The House of Representatives of China refused to consider any war measure until the Premier and Minister of War, Tuan Chi Hui, had resigned and the Cabinet had been reorganized. *N. Y. Times*, May 20, 1917.
- 21 GERMANY — SWEDEN. Germany reported to have expressed to Sweden regret at the sinking by German submarines of the Swedish ships *Aspen*, *Vaterland* and *Kiken* in the Gulf of Bothnia. These ships, laden with grain, had just been released by Great Britain under a reciprocal agreement. *N. Y. Times*, May 22, 1917.
- 21 UNITED STATES — GERMANY. Frans von Rintelin, David Lamar, and H. B. Martin were found guilty and sentenced to one year in the penitentiary for violation of the Sherman Anti-Trust Act in attempting to prevent the shipment of munitions abroad. *N. Y. Times*, May 22, 1917.
- 21 GERMANY — BRAZIL. The German Prize Court at Hamburg decided adversely on six pleas entered to obtain release of the Brazilian steamer *Rio Pardo* captured Dec. 9, 1916, from Rotterdam for Hull with cargo of foodstuffs. *N. Y. Times*, May 22, 1917.
- 22 SOCIALIST CONFERENCE. Socialists met in Stockholm in conference. The Secretary of State of the United States refused passports to American delegates to the conference. The Sailors and Seamen's Union of Great Britain refused to allow the British delegates to travel by sea to Stockholm. *N. Y. Times*, June 13, 14, 1917; *London Times*, June 26, 27, 1917.
- 22 UNITED STATES. The President issued Executive Orders directing the Secretary of the Treasury to turn over certain German ships to the Secretary of the Navy to be used as colliers, etc., and directing the Secretary to the Navy to take title and equip for the service of the Navy of the United States certain other German ships. Texts: *U. S. Official Bulletin*, vol. 1, No. 18; *Executive Orders*, Nos. 2624, 2625.

- 23 UNITED STATES. Proclamation setting forth rules and regulations for the management of Panama Canal and maintenance of its neutrality. *Proclamation*, No. 1371.
- 24 UNITED STATES. Proclamation under which American citizens owning letters patent in Germany are permitted to pay any required fee, annuity, etc. *Proclamation*, No. 1372.
- 26 GERMANY. Germany announced the intention to sink hospital ships in the entire barred zone, except certain ships from Salonika to Gibraltar. Text: *N. Y. Times*, May 27, 1917.
- 26 GERMANY — UNITED STATES. Announced that 97 Americans are detained as hostages in Germany. *N. Y. Times*, May 27, 1917.
- 26 RUSSIA — UNITED STATES. The United States sent note to Russia stating position of the United States relative to the war. Text: *Current History*, vol. 6, Pt. 2:49.
- 27 GERMANY. Germany denied safe conduct to Belgian relief ships. *N. Y. Times*, May 28, 1917.
- 28 June 1. National Conference on the Foreign Relations of the United States held at Long Beach, Long Island, under the auspices of the Academy of Political Science in the City of New York in co-operation with the American Society of International Law. *N. Y. Times*, May 29-June 2, 1917.
- 29 GERMANY — BELGIUM. A new war tax of 10,000,000 francs levied by Germany in Belgium, making a total tax of 720,000,000 francs. *N. Y. Times*, May 29, 1917.
- 29 BRAZIL — GERMANY. Brazilian House of Representatives passed resolution revoking the proclamation of Brazilian neutrality in the war between Germany and the United States, and authorizing the President of Brazil to seize German ships. *N. Y. Times*, May 20, 1917.
- 30 RUSSIA. Council of Workmen's and Soldiers' Delegates announced that its special committee had decided to convoke an international conference at Stockholm if no objections are raised to that city as a place of meeting. The date proposed is between July 15 and 30 if that suits the Dutch Bureau and the Berne Committee. *London Times* (weekly ed.), June 8, 1917.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN ¹

Aliens Restriction Order, 1916. Order in Council further amending. Feb. 6, 1917. (St. R. & O. 1917, No. 128.) 1½d.

Birds, migratory, protection of, in Canada and the United States Convention between the United Kingdom and United States, signed at Washington, Aug. 16, 1916. (Treaty Series, 1917, No. 7.) 1½d.

British and foreign state papers. Vol. 106. 1913. 10s. 7d.

British prisoners of war and interned civilians in Germany. Further correspondence with the United States Ambassador respecting the treatment of. (Cd. 8477.) 4d.

Contraband of war. Proclamation making certain additions to, and amendments in, the list of articles to be treated as. Dec. 29, 1916. (St. R. & O. 1916, No. 910.) 1½d.

Defense of the Realm Manual. 2nd enlarged edition, revised to November 30, 1916, comprising introductory note; the Defence of the Realm Acts, as passed, with notes; the Defence of the Realm Regulations, as amended to November 30, 1916, printed in consolidated form, as provided by Orders in Council, with notes; Orders of a general character made under the Regulations to November 30, 1916, with notes; the Evidence (Amendment) Act, 1915: Analytical Index to Acts, Regulations, Orders, and notes. 2s. 4d.

Enemy Banks (London agencies). Report of Sir William Plender. Dec. 16, 1916. (Cd. 8430.) 4s.

———. Report of Messrs. Walter Leaf and R. V. Vassar Smith, with appendix, dated Jan. 12, 1917, on the progress made in discharge of the liabilities of the enemy banks in London. (Cd. 8455.) 1½d.

Extradition treaty between the United Kingdom and Siam, March 4, 1916. Accession of the States of Johore, Kedah, Perlis, Kelantan, and Trengganu. (Treaty Series, 1917, No. 3.) 1½d.

Netherlands. Order of Council further amending proclamation of

¹ Official publications of Great Britain may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

June 25, 1915, prohibiting the exportation of all articles to the Netherlands unless consigned as therein specified. (St. R. & O. 1916, No. 899.) Dec. 22, 1916. 1½d.

———. Feb. 23, 1917. (St. R. & O. 1917, No. 181.) 1½d.

Peace. Reply of the Allied Governments to the note communicated by the United States Ambassador on Dec. 20, 1916, containing the suggestion by the President of the United States that the belligerents in the present European War may state the terms on which the war might be concluded. (Cd. 8468.) 1½d.

———. Despatch to His Majesty's Ambassador at Washington respecting the. (Cd. 8439). 1½d.

———. Reply to the German peace note communicated by the French Government, on behalf of the Allied Powers, to the United States Ambassador in Paris, Dec. 30, 1916. (Cd. 8467.) 1½d.

Prize money, naval. Order in Council regulation the method and conditions of distribution of. Feb. 6, 1917. (St. R. & O. 1917, No. 212.) 1½d.

Prizes captured during the present war. Accession of Italy to the convention of Nov. 9, 1914, between the United Kingdom and France. London, Jan. 15, 1917. (Treaty Series, 1917, No. 6.) 1½d.

Reprisals restricting enemy commerce. Order in Council defining the expressions "enemy destination," "enemy origin," and "enemy property" in articles III and IV of the Order in Council of March 11, 1915. Jan. 10, 1917. (St. R. & O. 1917, No. 6.) 1½d.

———. Order in Council supplemental to Orders of March 11, 1915, and Jan. 10, 1917, for preventing commodities of any kind from reaching or leaving enemy countries. (St. R. & O. 1917, No. 163.) 1½d.

Safety of life at sea. Order in Council further postponing the coming into operation of the Merchant Shipping Convention Act, 1914, until Jan. 1, 1918. Dec. 22, 1916. (St. R. & O. 1916, No. 915.) 1½d.

Ships and cargoes brought into British ports under the Order in Council of March 11, 1915. Report of the committee appointed to enquire whether any avoidable delay is caused by the methods hitherto adopted. (Cd. 8469.) 1½d.

Switzerland. Proclamation prohibiting the exportation of certain articles to. March 13, 1917. (St. R. & O. 1917, No. 238.) 1½d.

Trading with the enemy. Consolidated statutory list of persons and firms in countries, other than enemy countries, with whom persons and firms in the United Kingdom are prohibited from trading. With

notes to British merchants engaged in foreign trade. Complete to Feb. 16, 1917. Prefaced by the proclamation, May 23, 1916, prohibiting trading with certain persons, or bodies of persons, of enemy nationality or enemy association. No. 19a. 7½d.

Treaty series, 1912-1916. General index. (Treaty Series, 1917, No. 4.) 4d.

UNITED STATES ²

Aeronautics. Address on command of the air by Robert E. Peary delivered before the 20th annual meeting of the American Academy of Political and Social Science, Philadelphia, Pa., April 29, 1916. 10 p. (S. doc. 687.) Paper, 5c.

Alien enemies. Directions issued by Attorney General for enforcement of President's proclamation of April 6, 1917. 2 p. *Justice Dept.*

———. Directions to United States marshals and attorneys for enforcement of President's proclamation of April 6, 1917. 4 p. *Justice Dept.*

———. Hearings on bill for registration of. Feb. 28, 1917. 27 p. [Includes laws governing restrictions on aliens in Great Britain, France, Italy, Germany, Austria-Hungary since beginning of European War; prepared by Legislative Reference Division, Library of Congress.] *Immigration and Naturalization Committee.*

American National Red Cross. Regulations governing employment of, in time of war. 1917. 11 p. Paper, 5c. *War Dept.*

Armed merchant ships. Report to accompany bill to authorize the President to supply merchant ships, property of citizens of United States and bearing American registry, with defensive arms, etc. [Includes minority views.] Feb. 28, 1917. 6 p. (H. rp. 1594.) *Foreign Affairs Committee.*

Birds, migratory, protection of. Hearings on bill to give effect to convention between United States and Great Britain, signed Aug. 16, 1916. Feb. 3-6, 1917. 2 pts. 42 p. *Foreign Affairs Committee.*

———. Report to accompany bill. Feb. 6, 1917. 4 p. (H. rp. 1430.) *Foreign Affairs Committee.*

———. April 20, 1917. 4 p. (S. rp. 27.) *Foreign Relations Committee.*

² When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Bonds of United States. Act to authorize issue of bonds to meet expenditures for national security and defense, and, for purpose of assisting in prosecution of the war, to extend credit to foreign governments. April 24, 1917. 4 p. (Public 3.) 5c.

Citizenship. Proceedings of First Citizenship Convention, Washington, D. C., July 10-15, 1916. 86 p. Paper, 10c.

———. Report to accompany bill to amend act in reference to expatriation of citizens and their protection abroad, as to citizenship of children heretofore born or hereafter born out of limits and jurisdiction of United States, whose fathers were, or may be at time of their birth, citizens thereof. Feb. 6, 1917. 2 p. (H. rp. 1436.) *Immigration and Naturalization Committee*.

Claims of Austria-Hungary, Greece, and Turkey for injuries inflicted on their nationals during riots in South Omaha, Nebr., Feb. 21, 1909. Report to accompany bill to authorize payment of indemnities. Feb. 15, 1917. 2 p. (H. rp. 1497.) *Foreign Affairs Committee*.

Consular service. Information regarding appointments and promotions in. Reprint 1917. 18 p. *State Dept.*

Cuba and the German Empire. Message transmitted to House of Representatives of United States by House of Representatives of Cuba, announcing pride of the people of Cuba in uniting their efforts to those of United States in war against Germany. April 11, 1917. 1 p. (H. doc. 18.) *House of Representatives*.

Diplomatic service. Information regarding appointments and promotions in. 1917. 14 p. *State Dept.*

Dominican Republic. Convention between United States and, for collection and application of customs revenues of Dominican Republic, signed Feb. 8, 1907. Reprint, with slight changes. 1917. 8 p. (Treaty Series 465.) *State Dept.*

Exports. Report to accompany bill to authorize President in time of war to give direction to exports from United States so as to insure their wise, economical, and profitable distribution to other countries. April 27, 1917. 1 p. (H. rp. 32.) *Interstate and Foreign Commerce Committee*.

German and Austrian vessels in ports of United States and its possessions. Statement presented by Mr. Lodge. 1917. 4 p. (S. doc. 722.) *Navigation Bureau*.

Germany. Report concerning note of German Secretary of Foreign Affairs sent Jan. 19, 1917, to German Minister to Mexico proposing

alliance with Mexico and Japan against United States. March 1, 1917. 2 p. (S. doc. 728.) *State Dept.*

———. Severance of diplomatic relations with. Address of President of United States to Congress. Feb. 3, 1917. 6 p.

———. Address of President of United States to Congress asking authority to employ such instrumentalities and methods as may be necessary to protect American ships and people in their legitimate and peaceful pursuits on the seas. Feb. 26, 1917. 6 p.

———. War against. Address of President advising Congress to declare. April 2, 1917. 10 p. Paper, 5 c.

———. Report to accompany joint resolution declaring, and making provision to prosecute same. April 3, 1917. 1 p. (S. rp. 1.) *Foreign Relations Committee.*

———. April 4, 1917. 14 p. (H. rp. 1.) *Foreign Affairs Committee.*

———. Joint resolution declaring and making provision to prosecute same. April 6, 1917. 1 p. (Pub. res. 1.) 5c.

———. Proclamation of existence of war. April 6, 1917. 3 p. (No. 1364.) *State Dept.*

———. President's address relative to coöperation of his fellow countrymen during present war. April 16, 1917. 4 p.

Immigration. Act to regulate. Feb. 5, 1917. 27 p. (Public 301.) Paper, 5c.

International relations. Address on America's position in two world wars by Atlee Pomerene delivered at celebration of 185th anniversary of birth of George Washington, Washington, D. C., Feb. 22, 1917. 9 p. (S. doc. 725.) *Senate.*

———. History of laws prohibiting correspondence with a foreign government and acceptance of a commission. By Charles Warren. Assistant Attorney General. 1917. 23 p. (S. doc. 696.) Paper, 5c.

———. Laws of United States relating to war, diplomatic intercourse, blockades, and neutrality. 34 p. (S. doc. 714.) Paper, 5c.

Malambo fire claimants. Report to accompany bill to pay Panama amount awarded by joint commission under Article 6 of treaty of Nov. 18, 1903. Feb. 8, 1917. 1 p. (S. rp. 1019.) *Foreign Relations Committee.*

Maritime law. Report to accompany bill relating to maintenance of actions for death on high seas. Feb. 5, 1917. 4 p. (H. rp. 1419.) *Judiciary Committee.*

Munitions. Report to accompany bill to punish destruction or injuring of war material and war transportation facilities and to forbid hostile use of property during time of war. April 13, 1917. 1 p. (H. rp. 11.) *Judiciary Committee*.

Naturalization laws and regulations. Feb. 15, 1917. 36 p. Paper, 5c.

Neutrality. History of our relations with Germany and Great Britain as detailed in documents that passed between United States and two great belligerent Powers. By S. D. Fess. 1917. 2 pts. 431 p. [Part 1, Submarine controversy; Part 2, Restraints of trade controversy.] (H. doc. 2111, 64th Cong. 2d sess.) Paper, each 15c.

Niagara River water power. Hearings on bills for control, regulation and use of. 1917. 135 p. il. *Foreign Relations Committee*.

Norway. Communication, with accompanying papers, in relation to claim presented by, against United States on account of detention of three members of crew of Norwegian ship *Ingrid*. April 28, 1917. 2 p. (H. doc. 81.) *State Dept.*

Pan American Scientific Congress. Segundo Congreso Científico Panamericano: Acta final y su comentario; preparados por James Brown Scott. 1916. 502 p. *State Dept.* [The English edition of this publication was entered in this JOURNAL for October, 1916, p. 908.]

Panama Canal. Difficulties encountered in applying present laws relating to collection of tolls on vessels using. 12 p. *Panama Canal*. (Washington Office.)

———. Executive order authorizing Governor of The Panama Canal to exclude certain undesirable classes of persons from the Canal Zone. Feb. 6, 1917. 3 p. (No. 2527.) *State Dept.*

———. Executive order relating to exclusion of Chinese from the Canal Zone. Feb. 6, 1917. 2 p. (No. 2526.) *State Dept.*

———. Hearings concerning estimates for construction and fortification of. 1917. 118 p. *Appropriations Committee*.

———. Report to accompany bill providing that Panama Canal rules shall govern in measurement of vessels for imposing tolls. Feb. 8, 1917. 4 p. (S. rp. 1015.) *Inter-oceanic Canals Committee*.

———. April 10, 1917. 4 p. (S. rp. 6.) *Interoceanic Canals Committee*.

Passports. Rules governing granting and issuing of. 1917. 6 p. *State Dept.*

Peace problem. Address by John Bassett Moore delivered at

Founder's Day celebration of the Carnegie Institute in Pittsburgh, Pa., April 27, 1916. 13 p. (S. doc. 700.) Paper, 5c.

Porto Rico. An Act to provide civil government for. March 2, 1917. 21 p. (Public 368.) Paper, 5c.

Radio communications. Hearings on bill to regulate. Jan. 11-26, 1917. 447 p. *Merchant Marine and Fisheries Committee*.

———. Laws of United States and international radio-telegraphic convention, regulations governing radio operators and use of radio apparatus on ships and on land. July 27, 1914. [Reprint 1917, with addenda.] 100 p. il. Paper, 5c.

Recruiting and enlistment. Report to accompany bill to amend criminal code so as to allow country engaged in war with country with which United States is at war to recruit among its own citizens and subjects within borders of United States. April 16, 1917. 1 p. (H. rp. 14.) *Judiciary Committee*.

———. April 18, 1917. (S. rp. 21.) 2 p. *Judiciary Committee*.

Russia. Report to accompany resolution that United States congratulate the people of Russia on their assumption of powers, duties, and responsibilities of self-government. April 13, 1917. 5 p. (H. rp. 12.) *Foreign Affairs Committee*.

Ruthenians (Ukrainians). Joint resolution requesting the President to appoint a day on which funds may be raised for relief of. March 2, 1917. (Pub. res. 52.) Paper, 5c.

———. Proclamation appointing day. March 16, 1917. (No. 1359.) *State Dept.*

Seal and seal fisheries. Report relating to alleged illegal killing of fur seals in Pribilof Islands and opinion of Attorney General in relation thereto. Feb. 28, 1917. 6 p. (S. doc. 726.) *Justice Dept.*

Shipping Board. Statements of William Denman, chairman, and Theodore Brent, commissioner of Shipping Board, and Charles Yates, Coast and Geodetic Survey. 1917. 23 p. 1 tab. *Appropriations Committee*.

Ships. Proclamation forbidding transfer of any vessel registered under laws of the United States to any person not citizen of United States or to foreign registry or flag. Feb. 5, 1917. *State Dept.*

———. Report to accompany bill to regulate conduct of vessels in United States ports in case of war. Feb. 15, 1917. 1 p. (H. rp. 1496.) *Judiciary Committee*.

———. Report to accompany bill to prevent injury to vessels en-

gaged in foreign commerce. Feb. 5, 1917. 1 p. (H. rp. 1426.) *Judiciary Committee.*

Sovereignities and their rulers. List of. 11th ed. Jan. 1, 1917. *Naturalization Bureau.*

Spies. Hearings on bill to punish espionage and interference with neutrality. Feb. 22, 1917. 31 p. (Serial 53.) *Judiciary Committee.*

———. Report to accompany bill. Feb. 28, 1917. 3 p. (H. rp. 1591.) *Judiciary Committee.*

———. Report to accompany bill to punish espionage and enforce criminal laws of United States. April 25, 1917. 10 p. (H. rp. 30.) *Judiciary Committee.*

Suits by States against Federal Government. Report to accompany bill giving consent for. Feb. 8, 1917. 3 p. (H. rp. 1444.) *Judiciary Committee.*

Treason and misprision of treason. Proclamation. April 16, 1917. 2 p. (No. 1368.) *State Dept.*

Water pollution. Hearings *in re* remedies for pollution of boundary waters between United States and Canada. June 21–27, and August 25, 1916. 161 p. Paper, 15c.

West Indies. Convention between United States and Denmark for cession of; signed New York, Aug. 4, 1916. 15 p. (Treaty Series 629.) *State Dept.*

———. An Act to provide temporary government for islands acquired by United States from Denmark. March 3, 1917. 2 p. (Public 389.) Paper, 5c.

———. Statements of Robert Lansing and Frank McIntyre, Feb. 12 and 14, 1917. 2 pts. 47 p. *Foreign Affairs Committee.*

———. Report to accompany bill to provide for temporary government. Feb. 17, 1917. 10 p. (H. rp. 1505.) Paper, 5c.

———. Payment by United States for. Proclamation. March 31, 1917. 1 p. (No. 2568.)

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

THE REPUBLIC OF EL SALVADOR *v.* THE REPUBLIC OF NICARAGUA

Central American Court of Justice

OPINION AND DECISION OF THE COURT¹

*San José de Costa Rica, on the ninth day of March, nineteen hundred
and seventeen, at four o'clock, p.m.*

In the action commenced and maintained by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua, arising out of the conclusion of a treaty by the latter with the Government of the United States of North America, known as the Bryan-Chamorro Treaty, which relates, among other matters, to the leasing of a naval base in the Gulf of Fonseca, the Court, having considered the proceedings had herein, hereby renders its decision.

The honorable the Chargé d'Affaires of El Salvador in this Republic, Dr. Don Gregorio Martin, intervened herein on behalf of the complainant Government and Dr. Don Alonso Reyes Guerra appeared on its behalf as attorney of record; the high party defendant was represented by Dr. Don Manuel Pasos Arana.

FIRST PART

CHAPTER I

It appears:

I. That on the 28th day of August, 1916, in accordance with powers to that end duly exhibited, the honorable the Chargé d'Affaires of El Salvador, Dr. Don Gregorio Martin, appearing in the name of his Government, brought before this Court a complaint against the Republic of Nicaragua wherein the conclusion of the Bryan-Chamorro Treaty by the latter Government with the United States of North America, was alleged. In support of the action, the complaint sets

¹ Translation published by the Legation of Salvador, Washington, D.C.

forth the arguments of fact and law, and it is accompanied by the evidence considered pertinent thereto by the high party complainant.

ARGUMENTS OF FACT AND LAW

Stated concretely, the high party complainant alleges as follows:

The treaty referred to, which was negotiated by the then Secretary of State of the United States, the Honorable William Jennings Bryan, and the then Minister of Nicaragua at Washington, General Don Emiliano Chamorro, in addition to granting to the United States certain rights for the construction of an interoceanic canal, grants to that Republic, for the term of ninety-nine years (renewable for a further term of the same duration), for the establishment of a naval base, a part of the Gulf of Fonseca. The stipulations of that pact are held by El Salvador to be highly prejudicial to her supreme interests, in that they endanger her security and preservation, violate her rights of co-ownership in the Gulf of Fonseca and strike at her legitimate hopes for the future as a Central American nation.

II. The complaint is made up of various captions intended to develop, from different points of view, the claims of the high party complainant.

The first caption is devoted to a discussion of the following point: "The treaty is an official act of the Government of Nicaragua that places in danger the national security of El Salvador." It begins with this paragraph:

It must be patent to every one that the establishment, by a powerful state, of a naval base in the immediate vicinity of the Republic of El Salvador would constitute a serious menace — not merely imaginary, but real and apparent — to the freedom of life and the autonomy of that republic. And that positive menace would exist, not solely by reason of the influence that the United States, as an essential to the adequate development of the ends determined upon for the efficiency and security of the proposed naval base, would naturally need to exercise and enjoy at all times in connection with incidents of the highest importance in the national life of the small neighboring states, but would be also, and especially, vital, because in the future, in any armed conflict that might arise between the United States and one or more military Powers, the territories bounded by the Gulf of Fonseca would be converted, to an extent incalculable in view of the offensive power and range of modern armaments, into belligerent camps wherein would be decided the fate of the proposed naval establishment — a decision that would inevitably involve the sacrifice of the independence and sovereignty of the weaker Central American States as has been the case with the smaller nations in the present European struggle under conditions more or less similar.

At the outset, for the purpose of showing that, in negotiating that treaty, the Government of Nicaragua did not, as it has maintained, confine itself to its own exclusive territorial jurisdiction, but infringed thereby upon the rights of El Salvador, the Agadir case was invoked. That case involved an attempt by Germany, in 1911, to seize the port of Agadir on the Moroccan coast for the establishment of a naval base, which attempt occasioned protests on the part of England and France, who claimed that the project constituted a menace to their national security with respect to their colonies in South Africa, and, because of the nearness of that port, a menace to the route followed by their vessels bound for East India through the Strait of Gibraltar.

Cited also is the Magdalena Bay case, wherein the United States of North America made positive objection to the transfer by certain United States citizens, to a Japanese commercial company, of land along the shores of that bay and which had been ceded to them by the Mexican Government. The matter resulted in the adoption, by the United States Senate, of the so-called Lodge Resolution, which is quoted in the complaint as follows:

That when any harbor or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government not American as to give that Government practical power of control for national purposes.

In discussing the same point, the complaint quotes from the editorial comment on the Lodge Resolution contained in the *American Journal of International Law*,¹ and adds:

The Lodge Resolution is susceptible of being misleading under the test of legal opinion, because the principle maintained therein does not refer to official acts or measures of government; nevertheless, it shows how far in the opinion of the North American Senate, a nation, even though powerful, may give way to its fears and display its zeal for national security, and for this reason the Foreign Office cites the Magdalena Bay case. Furthermore, the Senate's resolution puts in strong relief the fact that the opinion of that high legislative body of the United States — the nation with which the Bryan-Chamorro Treaty was concluded — is wholly in conformity with El Salvador's contentions against that treaty, however much that same high body, in its amendments to the said convention adopted at the time of its ratification, showed that it did not have it in mind to affect any existing right in either of the States of Costa Rica, El Salvador, or Honduras, which, however, it

¹ October, 1912 (vol. 6), p. 937. — Ed.

was recognized, had protested *for fear of the contrary*. This declaration of the United States Senate is in no way consonant with the spirit of the Lodge Resolution and the trend of opinion which, but a few years before, controlled that body in adopting the Lodge Resolution.

Consequently the reasoning on which the Government of Nicaragua relies in support of the legitimacy of its action in concluding the Bryan-Chamorro Treaty, when it says that it contracted "without injuring in the slightest degree the legitimate rights and interests of El Salvador or those of any other Central American Republics," is in manifest contradiction of the positions taken by other nations, for instance, the North American nation, through the medium of its national legislature; and it stands to reason that the fears entertained by the Government of El Salvador are of greater moment than were those of England and France in the Agadir case, and are of a character more definite and real than the fears that agitated the United States in the Magdalena Bay and other analogous cases contemplated by the Lodge Resolution.

III. Caption II of the complaint deals with the following point; "The Bryan-Chamorro Treaty ignores and violates the rights of co-ownership possessed by El Salvador in the Gulf of Fonseca." From the sixteenth century — says the complaint — when this gulf was discovered by the Spaniards, it belonged throughout the entire period of her dominion to Spain, the mother country, whose rights of exclusive ownership were never placed in doubt; and, on the emancipation of Central America, that ownership passed into the patrimony of the Federal Republic that was formed by the five States.

The complaint goes on to allege the exclusiveness of the Spanish ownership over those waters, the transfer of those rights to the Central American States constituting the Federal Government, and the exclusive ownership subsequently exercised by El Salvador, Honduras and Nicaragua, the geographic situation of the countries surrounding the gulf, the circumstance that the use of those waters for fishing and other analogous purposes has never been exercised or even claimed by any other nations, and, denying the pretensions of the Nicaraguan Government that the waters of the Gulf of Fonseca are not common to the three States, advances the following argument:

(a) That because, for a long period of years, those waters belonged to a single political entity, to wit, the Spanish Colonial Government in Central America, and, later, to the Federal Republic of the Center of America, the fact conclusively results that, on the dissolution of the federation without having effected a delimitation among the three riparian States of their sovereignty therein, the ownership of those waters continued in common in those three States.

(b) That it matters not that in the year 1900, as a consequence of the convention for the demarcation of boundaries, the Governments of Honduras and Nicaragua fixed a divisionary line between the two countries in the waters of the Gulf; because that act was brought about without the intervention of El Salvador, and such intervention was essential to its validity and practical effect, since it dealt with property that was common, not only as between Honduras and Nicaragua, but also to the sovereign State of El Salvador; and that that antecedent did not affect the root of the question, but, on the contrary, showed, as did the attempt that was made, in 1884, with the same object in view, by El Salvador and Honduras — without consummation, however — that the idea that has always prevailed among the three riparian States is that their ownership over the waters of the Gulf of Fonseca is an undivided ownership.

(c) That the reasons urged against the theory of coöwnership in the annual report of the Ministry of Foreign Relations of Nicaragua, to the National Congress for the year 1914, are unsound; and that in that report the Minister maintains on behalf of his Government the following:

There exists, then, no community between Nicaragua and Honduras in the Gulf of Fonseca, and El Salvador, being neither a neighbor nor a co-boundary State with us — the Republic of Honduras lying in between — the community claimed with Nicaragua and alleged in the Salvadorean protest, does not and cannot exist.

Furthermore, the status of common ownership in, and the indivisibleness of, the waters of a bay are very different from the status of an inheritance or an estate in lands, for, whereas, with respect to the former, there exists the general principle that the parts adjacent to their coasts belong to the several nations — so that, on the laying out of the terrestrial boundary line, demarcation of the maritime waters is understood — there is no similar principle with respect to landed properties, since at one point or another the coparceners thereof stand to receive what belongs to them indifferently — though even then, where those landed properties are contiguous, the civil law provides that the portion to be adjudicated to each co-parcener shall be that part of the common property which is contiguous to his own land.

One nation cannot possess the right to a greater portion of the waters of a bay possessed in common with others than that shown to belong to it by the extension of its respective coasts; and the Republic of El Salvador being situated at the extreme northwest of the Bay of Fonseca, and that of Nicaragua in the extreme southeast, the two being separated by Honduras, the maritime ownership enjoyed by the first-named Republic could not possibly extend one inch farther than the point fixed by the limit of its coasts which separates it from Honduran territory.

That in opposition to this argument, the complaint maintains that the Gulf of Fonseca belongs to the category of what are called "his-

toric bays," such as the Chesapeake and Delaware Bays on the coasts of the Great Republic of the North, and the Bays of Conception, Chaleur and Miramiche in the Dominion of Canada; and it adopts wholly the doctrines put forth by the Salvadorean Foreign Office in its protests before the Department of State at Washington, which were directed first against the Chamorro-Weitzell Treaty, and later against the Bryan-Chamorro Treaty.

(d) That the circumstance that not one State alone, but three, possess the shores of the Gulf, does not prevent the application to the Gulf of Fonseca of the principles underlying historic bays, because those three States, in the course of their history, have not always been independent each of the others, but heretofore formed parts of a single international political entity.

(e) That, apart from its character as a historic bay, the Gulf of Fonseca presents the particular condition that its entrance, between the summits of the Islands of Meanguera and Meanguerita on the line traced from Chiquirín Point, on the mainland of El Salvador, to Rosario Point, in the northeast region of the peninsula that forms the Nicaraguan promontory of Cosigüina, is not of an extent greater than the ten miles fixed generally by the publicists as essential to considering a bay as "territorial" or "closed," and adds the following consideration:

The geographical situation of the Salvadorean islands in the Gulf and the legal fact that they are separated from each other and from the island nearest the mainland, and the latter from Chiquirín Point, by narrow straits, the lower depths of which are sown with sand banks which in some instances prevent navigation by vessels of large draft, and, in others, permit navigation only through channels of narrow width that have been established by soundings, are elements sufficient, under international law, to sustain conclusively the contention that the chain formed by those islands constitutes a prolongation of the national territory into the Gulf; so that the Salvadorean mainland reaches out along the line above indicated as far as Meanguerita Island and in that locality narrows the entrance to the Gulf, in the direction of Rosario Point on the Nicaraguan coast, to a width of less than ten miles, counting such miles at sixty to a degree of latitude.

This Foreign Office claims that that width is less than ten miles because the measurement is verified by the scale on the best known maps of El Salvador, Honduras and Nicaragua. Those maps show that the width of the Gulf's mouth proper is at most thirty-five kilometers, which, at one kilometer to 0.539 (five hundred and thirty-nine thousandths) of a nautical mile, equaling one-sixtieth of a degree of latitude, are equivalent to eighteen miles and eight hundred and sixty-five thousandths (18.865) of a mile (Lloyd's Calendar for 1916, page 213, on "Nautical Measures"); that the width of the entrance between Meanguerita Island and Rosario Point, at its widest, is only half or less than half that distance, that is, nine miles

and four hundred and thirty-two thousandths (9.432) of a mile; that the latter width is cut by the sand banks (the Farallones) that form a prolongation of Nicaraguan territory and in reality reduce that entrance to a much smaller number of miles.

(f) And, finally, the complaint makes an exhaustive examination of the doctrine that is maintained by the scientific authors and associations and which upholds the ownership exercised by States over the sea and bays, beginning with the rule laid down by Bynkerschoek whose general maxim, "*imperium terræ feniri ubi finitur armorum vis*" is traced through its historical evolution.

IV. Caption III maintains the proposition that "The treaty violates primordial interests of El Salvador as a Central American State" and goes on to say that in the political Constitution of El Salvador, like those of the other Central American States, the principle is consecrated that those Republics are disintegrated parts of the Republic of the Center of America and that, as such, the power remains inherent in each to concur with all or any of the Central American States in the organization of a common national government; that the Constitution of Nicaragua, although in its second article it provides that the public capital powers may not enter into pacts or treaties that are opposed to the independence and integrity of the nation or which in any way affect its sovereignty, excludes from that rule pacts or treaties that "tend toward union with one or more of the Republics of Central America." The high party complainant continues, under the caption above quoted:

Alienations of territory by a Central American State to a foreign nation result, therefore, in impairing the transcendental interests that the Salvadorean people have always held, and still hold, constantly in mind as one of their greatest and most legitimate aspirations: that of the reconstitution, undiminished, with the brother peoples, of the great country that was once the master of the ancient Central American domain — an aspiration towards which the five States are impelled by their common origin, religion and history. Such alienations would deeply wound that aspiration and detract from the efficacy of the great interests that the Salvadorean people, as a fractional part of the Central American people, hold to be of first importance to their national life in the future. The Nicaraguan people and the peoples of the other three States recognize, maintain and value those interests in the same measure. This is shown by the multitude of historic facts and political acts of their independent lives, among which may be mentioned those that gave rise to the negotiation of the conventions that were concluded at Washington in 1907. One of those conventions was the pact that instituted the Honorable Tribunal before which, through the medium of the Salvadorean Government, represented by this Foreign Office, one of those peoples, is now appearing in quest of justice, to wit, the people of El Salvador.

V. Caption IV deals with the proposition that "The treaty is contrary to Article II of the General Convention of Peace and Amity subscribed by the Republics of Central America at Washington on the twentieth of December, 1907." In that chapter the complainant argues that the text of said article imposes upon the States the agreement not to alter in any form their constitutional order, because any alteration of that order was conceived by the delegates to the treaty convention to be a menace to the peace and security of each of the States they represented, and of Central America in general, and to be contrary to their established policy and to the prestige with which they ought to surround themselves — this for the purpose of warding off, for the future, every danger that could threaten the peace of Central America; that, with those ideas in mind, they could not be oblivious to the greatest danger of all, which was the possible change of the constitutional order, by which must be understood, not only the form of government adopted by the fundamental law of each State, but all standards adopted by the constituent assemblies whereby the public powers must model their acts of government in matters of primordial interest; and that national sovereignty, independence and integrity are matters that are found, in this sense, ranged in culminating rank.

VI. Caption V maintains the following proposition: "The treaty could not have been validly concluded," and, in support thereof, cited Article 2 of the political Constitution in force in the Republic of Nicaragua, which reads as follows:

Sovereignty is one, inalienable and imprescriptible, and resides essentially in the people, from whom the functionaries established by the Constitution and the laws derive their powers. Consequently, no pacts or treaties may be entered into that are opposed to the independence or integrity of the nation, or which in any way affect its sovereignty, save only those that tend toward unity with one or more of the Central American Republics.

The chapter continues by way of commentary:

The text of this article constitutes a fundamental rule of government which previous political constitutions of that same Republic have adopted as the rule that the Nicaraguan people have wished to see respected by the public power.

Openly and essentially is the text opposed to the stipulations of the Bryan-Chamorro Treaty, wherein the Government of Nicaragua not only cedes to the United States a zone of Nicaraguan soil for the construction therethrough of an interoceanic canal, besides the Corn Islands in the Atlantic and a portion of territory to be selected by the North American Government on the littoral of the Gulf of Fonseca, but, conformably with the amendments to Article III of the treaty, made

by the United States Senate in its ratification resolution, restricts its sovereignty in fiscal and financial matters.

Those stipulations, therefore, are absolutely invalid, and for that reason cannot be carried out in face of the principles of international justice that control cases of international agreements that are fundamentally null, especially when the nation that has contracted with another whose fundamental laws are opposed to the subject-matter of the agreement has previous and full knowledge of the reasons why it is invalid and when, moreover, such agreements diminish by their invalid stipulations, the primordial rights of a third nation.

VII. In Caption VI of the complaint the high party complainant confines itself to showing: "that the Government of El Salvador sought to discuss with the Nicaraguan Government its right to oppose the effective consummation of the Bryan-Chamorro Treaty; that to that end the Salvadorean Foreign Office addressed to the Nicaraguan Foreign Office a note on that subject which was placed in the hands of the Minister of Foreign Relations of Nicaragua by special Foreign Office couriers, and that, as the note referred to has not even been acknowledged, the Government of El Salvador is forced into the position of being unable to reach a settlement with the Nicaraguan Government and of being justified in concluding that the latter has rejected any settlement of the matter."

In an additional paper, however, presented on the same date with the complaint, the high party complainant sets forth that after the signing of the complaint the answer of the Nicaraguan Foreign Office was received, and that therein, having recited the bases on which the Salvadorean Government relies in its opposition to the Bryan-Chamorro Treaty, and having set forth, in its turn, the bases considered by the Nicaraguan Government as warranting its insistence, over the protests of El Salvador, on fulfilling the treaty, the answer concludes as follows:

In conclusion, Your Excellency must permit me to observe that, in consonance with the solemn declaration, contained in the note itself, that the Government of El Salvador will avail itself of every means afforded it by justice, law and existing international agreements to secure the invalidation of that pact, my Government, in its turn, expresses to Your Excellency's Government its unalterable purpose to avail itself also of all means afforded to it by justice and law to maintain inviolate the validity of that diplomatic agreement.

VIII. The complaint, which has been epitomized in the foregoing, concludes with the following formal petition and prayers:

For the reasons above set forth, the Salvadorean Foreign Office, in the name of and representing the Government of El Salvador, prays that the Government of Nicaragua be enjoined to abstain from fulfilling the Bryan-Chamorro Treaty, subscribed at Washington the fifth day of August, nineteen hundred and fourteen, and, therefore, reiterating its expressions of respect and consideration, petitions the honorable, the Central American Court of Justice:

First. — That the complaint hereby interposed be admitted and considered together with the appendices hereto attached.

Second. — That, in conformity with the text and spirit of Article XVIII of the Central American Convention concluded at Washington, herein last above cited, the appropriate decree may issue fixing the legal situation to be maintained by the Government of Nicaragua in the matter which is the subject of this complaint, in order that the things here in litigation may be preserved in the status in which they were found before the conclusion and ratification of the Bryan-Chamorro Treaty.

Third. — That, by the final decision, the Government of Nicaragua be enjoined to abstain from fulfilling the aforesaid Bryan-Chamorro Treaty, and,

Fourth. — That this honorable Court grant such other and further relief as may seem to it just and proper.

IX. The high party complainant attaches to its complaint the documents on which it relies for support. Those documents in the form of appendices, are specified in the complaint as follows:

A. Copy of protest presented on the 21st of October, 1913, by the Salvadorean Foreign Office, through the medium of the Legation at Washington, to the Department of State of the United States.

B. Reply of the Hon. W. J. Bryan, Secretary of State, relating to that protest.

C. Copy of the Salvadorean Legation's rejoinder.

Ch. Copy of the note of July 8, 1914, addressed by the Salvadorean Legation on the same subject to the Department of State.

D. Reply of the Department of State, dated July 16, 1914.

E. Copy of the note addressed on the 21st of July, 1914, by the Salvadorean Legation to the Department of State referring to its answer of the 16th of the same month.

F. Copy of the Salvadorean Legation's note of December 21, 1914, to the Salvadorean Foreign Office, transmitting the Bryan-Chamorro Treaty which had been handed to it by the Secretary of State of the United States.

G. Note of the Hon. William J. Bryan to the Salvadorean Legation transmitting copy of the above-mentioned treaty.

H. The Bryan-Chamorro Treaty.

I. Note of protest relating to said treaty, addressed on the 9th of February, 1916, through the medium of the Salvadorean Legation, to the Department of State.

J. Note of the United States Legation, dated the 19th of

February, 1916, wherein, under instructions from the Department of State, the Minister informs the Salvadorean Foreign Office that the said Bryan-Chamorro Treaty had been ratified, with amendments by the United States Senate.

K. Copy of the Salvadorean Foreign Office's reply, dated March 3, 1916, wherein it protests against the ratification of the said treaty.

L. Copy of the note addressed by the Salvadorean Foreign Office to the Nicaraguan Foreign Office on the 14th of April, 1916, and delivered by Foreign Office Couriers, Captain José A. Menéndez and Lieutenant Santiago Ch. Jáuregui.

Ll. Copy of the telegrams addressed from Managua to the Salvadorean Foreign Office on the 4th of May, 1916, by His Excellency the Minister of Foreign Relations of Nicaragua and by the Foreign Office Courier, Captain J. A. Menéndez.

M. Copy of certain paragraphs of the report for the year 1914 presented to the National Congress of Nicaragua by His Excellency the Minister of Foreign Relations of that Republic.

N. Copy of certain articles of the Law of Navigation and Marine in force in El Salvador.

O. Technical report of Civil Engineers, Don Santiago I. Barbarena and Don José E. Alcaine, relating to the Gulf of Fonseca.

P. Map of the Gulf of Fonseca.

CHAPTER II

ANSWER TO THE COMPLAINT AND PROCEEDINGS IN THE CASE

It appears:

That the Court, by resolution adopted on the sixth of last September and communicated to the high parties and to the other Central American Governments, admitted the complaint herein, basing its action on the consideration that the signatory nations to the Conventions of Washington, in entering into the solemn agreement to submit to this Court all controversies or questions that might arise among them, whatever might be their nature and origin, established, in Article I of the respective convention, the jurisdiction and competency of this Court in such controversies, and imposed no other limitation than the requirement to seek first a settlement between the respective departments of foreign affairs of the Governments in controversy; that in view of the terms set forth in the answer of the Department of Foreign Relations of Nicaragua to the note of His Excellency the Minister of Foreign Relations of El Salvador, the Court is of the opinion that such

previous settlement was impossible, and that, therefore, the complaint comes properly under the jurisdictional power of the Court; wherefore, the Court rendered a preliminary decision in which it was ordered: that the complaint be admitted, that the evidence presented therewith be made a part of the record in the case, that the complaint be communicated to the defendant Government in due legal form, with notice to present its case and submit its evidence within the period of sixty days, and, finally, that, pending the final decision herein, the high parties remain in the same legal status that subsisted between them, prior to the conclusion of the Bryan-Chamorro Treaty.

That, during the period allowed within which to answer the complaint, the high party complainant, through the medium of the *Chargé d'Affaires* of El Salvador in this Republic (Costa Rica), and pending official confirmation by the Court, amplified the prayers contained in its complaint, by supplemental petitions of September 30, and October 2, 1916, in which, after restating its first prayers, the following points were added to its complaint and judgment asked thereon:

A. That the Bryan-Chamorro Treaty violates the rights of El Salvador in the Gulf of Fonseca;

B. That the said treaty also violates the rights resulting to El Salvador by virtue of Article IX of the General Treaty of Peace and Amity, concluded at Washington by the Central American Republics, by reason of the fact that no express and special reservation of those rights was made in said first-named pact;

C. That the Bryan-Chamorro Treaty violates the rights of El Salvador in the Gulf of Fonseca, because the grant therein to the United States, of a naval station in those waters, by its very nature, necessarily compromises the national security of El Salvador, and, at the same time, nullifies the rights of coöwnership, possessed by El Salvador in the said Gulf; and that, without the intervention and consent of that country, the Government of Nicaragua was without power legally to make that grant;

Ch. That the aforesaid grant and the lease of Great Corn Island and Little Corn Island to be held subject to the laws and exclusive sovereignty of the United States, are acts in violation of Article II of the General Treaty of Peace and Amity that was concluded by the plenipotentiaries of the Central American Republics at Washington; and

D. That the Government of Nicaragua be declared to be under the obligation to restore and maintain, in all respects and in all matters heretofore indicated, the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro Treaty.

It appears:

That the Court, by resolution adopted on the 2d day of the same month of October, admitted the petitions referred to as integral parts of the complaint, on the ground that because the Government of Nicaragua did not answer the complaint brought herein by the Government of El Salvador, it was proper to admit amplifications thereof in obedience to the universal rules of legal procedure; and it thereupon ordered that a new period of sixty days be allowed to run, within which to answer the complaint and its amplifications;

That, although notified of the above action, the high party defendant did not avail itself of the period granted; whereupon, in conformity with Article XV of the respective convention, and on the request of the attorney representing the high party complainant, the Court issued an order requiring the defendant Government to present its answer within a further period of twenty days;

That, before the expiration of the last-mentioned period, the Government of Nicaragua made its appearance in the case through the medium of its attorney, Dr. Don Manuel Pasos Arana; and, having been notified that said time limit was running against his Government, that gentleman, on the 6th of February, 1917, presented for the consideration of the Court a waiver of the time limitation together with the evidence he believed to be pertinent.

It appears:

That counsel for the high party defendant, before analyzing the arguments on which the Government of El Salvador relied in support of its complaint, protested that it was not his intention to answer the said complaint in its entirety, nor to acknowledge in any manner that the Central American Court of Justice had acquired jurisdiction to decide the case; and that, thereupon, under special captions, he made the following observations:

The Bryan-Chamorro Treaty does not place in danger the national security of El Salvador, nor does the establishment of an American naval base in the Gulf of Fonseca constitute a serious menace to its free and autonomous life, because, in order to maintain the contrary, it would be necessary to show that American influence in the republics of this continent, or even in the Central American Republics, was initiated — or commenced to reveal itself — by virtue of the Bryan-Chamorro Treaty, for history demonstrates that that influence, already long-existent therein, has not proven to have been an obstacle to the

enjoyment by those Republics of their full national life; there are even cases in which that influence has been beneficent.

Furthermore, says Nicaragua's counsel, the security and maintenance of the naval station does not involve, necessarily, the operation of the influence of the States bordering on the Gulf. That security and maintenance will depend upon other causes, such, for instance, as engineering work, war material stored, and the number of troops that may be needed to guard the station. "Force protects itself by force."

Such naval station would be, moreover, a guarantee of the independence of the Central American countries, since that independence, from the time of the break with Spain, has been guaranteed by the United States Government under the Monroe Doctrine, which makes it the defender and guardian of the continent; and the geographical situation of the Republic of Nicaragua, the possession of the Great Lake of Nicaragua and the rapid-strewn river of San Juan, which latter are to be combined for the construction of an interoceanic way of communication, place that Republic in an exceptional and different position from the other Republics of Central America, and make it subject to different criteria.

Counsel goes on to combat the argument of the high party complainant that the case of the naval station in the Gulf of Fonseca is similar to the Agadir case, which, he points out, concerned great military Powers involved in important rivalries in commerce and territorial expansion, whereas, with respect to the United States and the small countries adjacent to the Gulf of Fonseca, it is to be presumed that such rivalries and friction do not exist, and for many centuries will not exist.

Similar comment is made in reference to the case of Magdalena Bay, wherein, says counsel, were involved certain subjects of Japan, a military and naval Power of the first class, that might have established in that bay a naval station that would have been a menace to the communications and security of the United States or any other nation on this continent.

In regard to the argument that the Bryan-Chamorro Treaty ignores and violates the rights of El Salvador in the Gulf of Fonseca, counsel for Nicaragua refers to the reply on that point made by the Nicaraguan Foreign Office to the note addressed by the Salvadorean Foreign Office on the subject of the negotiation of the Bryan-Chamorro Treaty; and he adds certain other observations as follows:

He declares that the Government of Nicaragua understands perfectly that the ancient Spanish Provinces of Nicaragua, Honduras and El Salvador, by reason of the fact that they are adjacent, are owners of the Gulf in the sense that to each belongs a part thereof, but not in the sense that, thereby, a community in the legal acceptance of the word exists among those republics. Demarcation of frontiers therein is lacking: but this, he says, does not result in common ownership.

Counsel proceeds to argue that Nicaragua is not co-riparian with El Salvador in the Gulf of Fonseca, because the indispensable element of adjacency is absent. The States that are truly co-riparian, he continues, are Nicaragua with Honduras and Honduras with El Salvador, between which the status of being co-boundary States does exist.

In support of his argument, counsel invokes the boundary treaty entered into by the Republics of Nicaragua and Honduras in the year 1900. In that treaty Nicaragua takes the attitude of being in full exercise of her sovereignty, undisputed by any neighbor, over the portion of the waters that correspond to her in the Gulf of Fonseca. So, also, he invokes the attempt made by El Salvador, in 1884, to negotiate a boundary convention fixing the maritime boundary between El Salvador and Honduras; and, although that convention was not carried into effect, because of the failure of the Honduran Congress to approve it, all of its moral force, he says, detracts from El Salvador's present argument, because, for the conclusion of that treaty, the intervention and consent of Nicaragua was not asked — the very same point that is now made by El Salvador, in her own favor, with respect to the conclusion of the Bryan-Chamorro Treaty.

Those declarations are reinforced by citing the protest of the Honduran Government, a copy of which is before this Court, and which is discussed by counsel in a special section of his brief.

Counsel for the defendant Government understands, he says, that the lines of demarcation in the Gulf between Nicaragua and Honduras are actually traced, whereas those between El Salvador and Honduras are not; whereupon he makes the following statement of his understanding on this point:

The Government of Nicaragua is not inconvenienced by the claim that the Gulf of Fonseca is a bay that should be considered as being under the exclusive ownership of the three adjacent States thereto, for this does not indicate that such ownership by the three States constitutes a community: exclusive ownership over the Gulf, and nothing more, belongs to the Republics of Nicaragua, Honduras and

El Salvador in the maritime territorial parts that belong to them as owners of their respective coasts.

In his brief counsel makes lengthy legal argument as to the reasons set forth in the complaint in favor of coöwnership; but a résumé of that argument by the high party defendant is contained in the following paragraphs:

The Government of Nicaragua does not dispute, or cast doubt upon, the perfectly evident fact that the Bay of Fonseca is a closed or territorial bay; but it does deny that that characteristic attaches to it by reason of the fact that the three States adjacent to the Gulf, Nicaragua, Honduras and El Salvador, formerly belonged to a single international political entity, for, besides the fact that the said States preserved their autonomy, independence and even sovereignty whilst in the federation, the true reason underlying that characteristic is that the Gulf of Fonseca is *small in extent*, and, therefore, belongs to the nations that own its coasts.

The Government of Nicaragua understands perfectly that *imperium* may be exercised by the States independently of ownership and *absolute jurisdiction* over the sea, this in order that its economic laws may not be evaded in a zone as great as four leagues; but maintains that that right may only be exercised directly opposite along and coextensive with the coast of a nation over the high seas and not to the right or left over portions of the territorial waters of other nations adjacent on those sides; for the insurmountable barrier of foreign sovereignties stands in the way.

The argument that the Bryan-Chamorro Treaty violates primordial interests of El Salvador as a Central American State, is denied in the answer to the complaint, on the following grounds:

That El Salvador, like Nicaragua, Guatemala, Honduras and Costa Rica, is a free, independent and sovereign State; that the circumstance that those States were members of the Federal Republic of the Center of America does not diminish or alter the rights of sovereignty that pertain to them as a result of their reorganization as separate States; that the declarations contained in the various constitutions that now control, or have controlled, the Republics of Central America, with regard to the reconstruction of the old Federation, imply no more than the *possibility* of a return to the union — never an irrevocable obligation; that the Bryan-Chamorro Treaty is not contrary to Article II of the General Treaty of Peace and Amity concluded at Washington on the 20th of December, 1907, because it is not true that the five Central American States agreed not to alter in any form their constitutional order; that what they did agree to was to do nothing that would operate in any of them to the prejudice of the constitutional order.

In support of this argument, various observations are made and the following conclusion is reached:

The high party complainant only enunciates, but does not prove, the strange doctrine that the expression *constitutional order* must apply to every rule adopted by the Constituent Assemblies whereon the public powers might model their act in matters of primordial interest.

The answer then proceeds to interpret Article II of the treaty referred to in the following manner:

The dispositions or measures that are prohibited by the article cited are not such as are TAKEN BY THE SIGNATORY GOVERNMENTS WITH RESPECT TO THEMSELVES, but are direct dispositions, or measures, which, independently of one of the signatory Governments, operate to alter the constitutional order in ANY OF THE OTHER REPUBLICS.

It maintains that the nullity of the Bryan-Chamorro Treaty cannot be properly alleged, because the exclusive power to do so resides in the parties who negotiated that pact, or those who possessed the right to join therein; that the signatory parties to the treaty are Nicaragua and the United States of America, and that El Salvador did not possess the right to intervene in its negotiation, since Nicaragua, an independent, free and sovereign republic, is not subordinated, by any international agreement, either to that republic or to any other on earth.

The answer goes on to contest the bases underlying the additions to the complaint presented in the documents of September 30. and October 2. last, and announces that this Court may not take cognizance of the complaint interposed by the Government of El Salvador, for the reason that the present controversy does not involve a question purely Central American, but, rather, a mixed question that depends upon the rights of a third nation, which did not previously submit to the authority of this Court by means of the special convention provided for in Article IV of the organic pact; and in support of that argument, the answer invokes the document contained in the last conducive premise ("*considerando*") of the decision rendered by this Court in the action brought by the Government of Costa Rica against that of Nicaragua arising out of the concession by the latter Government to the United States for the construction of an interoceanic canal by way of the San Juan River, or any other route through Nicaraguan territory.

In conclusion, the high party defendant, through its counsel, makes the following exceptions:

First. — That the controversy between the Foreign Offices, on the subject, was not exhausted, because “the Government of the Republic of El Salvador, having chosen, in presenting its complaint, to ask that the decision be rendered on a new claim — a claim that had not been discussed between the respective Foreign Offices — it is obvious that in that case it cannot be truly stated that an agreement could not be reached”; and,

Second. — That the Court is incompetent, for lack of jurisdiction, to take cognizance of, and decide, the complaint and the additions thereto presented by the Government of El Salvador.

The evidence adduced by the high party defendant, and attached to its answer, comprises:

A. Note of the Nicaraguan Foreign Office of July 26, 1916, in reply to the note addressed to it by the Salvadorean Foreign Office relating to the conclusion of the Bryan-Chamorro Treaty;

B. A royal *cédula* (decree) addressed to Diego Gutiérrez referring to territorial boundaries during the colonial period; and,

C. Documents relating to the attempt made in 1901 by the Governments of Nicaragua and the United States looking to the alienation of the canal route across Nicaraguan territory.

It appears: that the Court, by resolution of February 9th, of the present year, held that the time limit granted to the Nicaraguan Government within which to answer the complaint and the additions thereto had expired, and declared that the case was ready for hearing; it then fixed the 19th of February as the day on which the final arguments of the high parties were to be heard.

It appears: that, at the public hearing called as above stated, Dr. Don Alonso Reyes Guerra, for the high party complainant, and Dr. Don Manuel Pasos Arana, for the high party defendant, appeared and argued at length their respective claims.

It appears: that, at the session held by this Court on the first and second days of the present month, the questions submitted were fully discussed, and the points contained in the questionnaire (statement of issues) heretofore approved were voted upon in the manner set forth in the act passed at that session, which act reads as follows:

ACT RECORDING THE VOTES OF THE COURT IN THE CASE

THE CENTRAL AMERICAN COURT OF JUSTICE, San José de Costa Rica, at 5 o'clock in the afternoon of the 2d of March, nineteen hundred and seventeen.

The Court, having concluded its deliberations preparatory to a final decision of the suit brought by the Government of El Salvador against the Government of Nicaragua, proceeded to take a vote on each of the twenty-four points comprised in the questionnaire heretofore approved, with the following result:

First Question. — Shall the Court proceed to take cognizance of the peremptory exception to its competency for lack of jurisdiction (submitted by the high party defendant on the expiration of the time limit running against it), in so far as that exception relates to the original complaint, notwithstanding the Court admitted that complaint by act of September 6, nineteen hundred and sixteen?

Answered in the affirmative by all the judges.

Second Question. — Is the Court competent to take cognizance of the case on the issues presented?

Answered in the affirmative by all of the judges, Judge Gutiérrez Navas adding: "in so far as relates exclusively to the Republics of Nicaragua and El Salvador.

Third Question. — In view of the fact that the case involves contractual interests of a third nation that is not a party thereto, and that is not subject to the jurisdiction of the Court, has this Court jurisdiction to render a decision therein with reference to the rights in controversy between El Salvador and Nicaragua?

Answered in the affirmative by all the Judges, Judge Gutiérrez Navas adding the same proviso that appears in the answer to the preceding question.

Fourth Question. — Do the additions to the complaint, dated the 30th of September and 2d of October, nineteen hundred and sixteen, contain matter extraneous to the origin of the diplomatic controversy that preceded the litigation?

Answered in the negative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the affirmative by Judge Gutiérrez Navas.

Fifth Question. — Referring to the answers to the preceding question, and the findings in the acts of the Court herein, was the Salvadorean Government under the obligation previously to seek a diplomatic settlement with the Government of Nicaragua on the concrete points set forth in the additions to the complaint?

Answered in the negative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the affirmative by Judge Gutiérrez Navas.

Sixth Question. — Is the Court competent to take cognizance of and decide the prayers contained in the additions to the complaint above referred to?

Answered in the affirmative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the negative by Judge Gutiérrez Navas.

Seventh Question. — Is the Court competent to take cognizance of, and declare the law with respect to, the initial petition in the complaint?

Judges Medal, Oreamuno and Castro Ramírez answered in the affirmative, on the ground that such cognizance is for the purpose of establishing the legal relations between the high parties litigant; Judge Gutiérrez Navas answered in the negative on the ground that he regarded it as legally impossible to prohibit the ful-

fillment of a contract without affecting the rights of one of the contracting parties that is not a party to the suit; and Judge Bocanegra answered in the affirmative, on the ground that such cognizance is for the purpose of declaring the legal relations that exist between the contending Central American States, but not for the purpose of deciding anything that affects third parties that are not parties to the suit.

Eighth Question. — As a consequence, should the exceptions proposed by the high party defendant be accepted or rejected?

Judges Medal, Oreamuno and Castro Ramírez answered that they should be rejected; Judge Gutiérrez Navas answered that they should be accepted; and Judge Bocanegra answered that the Court should accept the exceptions proposed in so far as they relate to the concluding part of the answer made by him to the Seventh Question, and that the rest thereof should be rejected.

Ninth Question. — Taking into consideration the geographic and historic conditions, as well as the situation, extent and configuration of the Gulf of Fonseca, what is the international legal status of that Gulf?

The judges answered unanimously that it is an historic bay possessed of the characteristics of a closed sea.

Tenth Question. — As to which of those characteristics are the high parties litigant in accord?

The judges answered unanimously that the parties are agreed that the Gulf is a closed sea.

Eleventh Question. — What is the legal status of the Gulf of Fonseca in the light of the foregoing answer and the concurrence of the high parties litigant, as expressed in their arguments, with respect to ownership and the incidents derived therefrom?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that the legal status of the Gulf of Fonseca, according to the terms of the question, is that of property belonging to the three countries that surround it; and Judge Gutiérrez Navas answered that the ownership of the Gulf of Fonseca belongs, respectively, to the three riparian countries in proportion.

Twelfth Question. — Are the high parties litigant in accord as to the fact that the waters embraced in the inspection zones that pertain to each, respectively, are intermingled at the entrance of the Gulf of Fonseca?

The judges answered unanimously that the high parties are agreed that the waters which form the entrance to the Gulf intermingle.

Thirteenth Question. — What direction should the maritime inspection zone follow with respect to the coasts of the countries that surround the Gulf?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that the zone should follow the contours of the respective coasts, as well within as outside the Gulf; and Judge Gutiérrez Navas that, with respect to the Gulf of Fonseca, the radius of a marine league zone of territorial sea should be measured from a line drawn across the bay at the narrowest part of the entrance towards the high seas, and the zone of inspection extends three leagues more in the same direction.

Fourteenth Question. — Does the right of coownership exist between the Republics of El Salvador and Nicaragua in the non-littoral waters of the Gulf, and in those waters also, that are intermingled because of the existence of the respective zones of inspection in which those Republics exercise police power and the rights of national security and defense?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that such right of co-ownership does exist, without prejudice, however, to the rights that belong to Honduras in those non-littoral waters; Judge Gutiérrez Navas answered in the negative.

Fifteenth Question. — Wherefore, as a consequence, and conformably with their internal laws and with international law, should there be excepted from the community of interest or coownership the league of maritime littoral that belongs to each of the States that surround the Gulf of Fonseca adjacent to the coasts of their mainlands and islands respectively, and in which they have exercised, and may exercise, their exclusive sovereignty?

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez; and in the negative by Judge Gutiérrez Navas, on the ground that in the interior of closed gulfs or bays there is no littoral zone; Judge Bocanegra answered in the affirmative on the ground that the high parties litigant, having accepted the Gulf of Fonseca as a closed bay, the existence of the marine league of exclusive ownership becomes necessary, since the Gulf belongs to three nations instead of one.

Sixteenth Question. — Did the Government of Nicaragua, in granting the concessions contained in the Bryan-Chamorro Treaty for the establishment of a naval base, violate the right of coownership possessed by El Salvador in the Gulf of Fonseca?

Answered in the affirmative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the negative by Judge Gutiérrez Navas.

Seventeenth Question. — Does the establishment, in the Gulf of Fonseca, of a naval base, by reason of its nature and transcendental importance, compromise the security of El Salvador?

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez, and in the negative by Judge Gutiérrez Navas. Judge Bocanegra answered in the affirmative, on the ground of the possible risk of aggression against the naval base on the part of other Powers with which the concessionary Power might in the future be at war.

Eighteenth Question. — Are the concessions for a naval base in the Gulf of Fonseca and the lease of Great Corn Island and Little Corn Island, that were granted by Nicaragua, and that placed certain waters and territory of Nicaragua under the laws and sovereignty of a foreign nation, acts that violate Article II of the General Treaty of Peace and Amity concluded at Washington by the Central American Republics?

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez, and in the negative by Judge Gutiérrez Navas. Judge Bocanegra answered in the affirmative, but on the ground that the change here contemplated affects not only the State wherein it operates, but also the other countries signatory to the treaty referred to in the question.

Nineteenth Question. — Can it be legally declared that the Bryan-Chamorro Treaty violates primordial interests of El Salvador as a Central American State?

Judges Medal, Oreamuno and Castro Ramírez answered in the affirmative, in so far as relates to the aspirations consecrated by their respective political constitutions and the purview of Central American public law regarding the reconstruction of the old Federal Republic of the Center of America. Judge Gutiérrez Navas answered in the negative. Judge Bocanegra answered that such declaration may not properly be made, because it refers to interests pertaining to the future and possessed of a moral and political character, the judicial determination of which is impossible on the part of the Court at this time.

Twentieth Question. — Was the intervention and consent of the Republic of El Salvador necessary to the Government of Nicaragua in order that the latter might validly grant the concession for a naval base in the Gulf of Fonseca?

Judges Medal, Oreamuno and Castro Ramírez answered that the intervention and consent of the Government of El Salvador were necessary to the Government of Nicaragua for the concession of a naval base; Judge Gutiérrez Navas answered in the negative; and Judge Bocanegra answered that, in view of the fact that the question of nullity is not involved in this action, the word "validly" should be eliminated from the question and that, therefore, he eliminates the word from his answer, which is affirmative.

Twenty-first Question. — Has the Government of Nicaragua, by its conclusion of the Bryan-Chamorro Treaty, violated rights that belong to El Salvador by virtue of Article IX of the General Treaty of Peace and Amity above mentioned?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered in the affirmative, and Judge Gutiérrez Navas in the negative.

Twenty-second Question. — Is the defendant Government under the obligation, in conformity with the principles of international law, to reestablish and maintain the legal status that existed between El Salvador and Nicaragua prior to the conclusion of the Bryan-Chamorro Treaty respecting matters here at issue?

Judges Medal, Oreamuno and Castro Ramírez answered that in conformity with measures possible under that law, that Government is so obligated. Judge Gutiérrez Navas answered in the negative, on the ground that there has been no change in the legal status; and Judge Bocanegra answered that in his opinion the Nicaraguan Government is under the obligation to make such reparation as may be possible in conformity with the principles of international law.

Twenty-third Question. — Can the Court enjoin the Government of Nicaragua to abstain from fulfilling the Bryan-Chamorro Treaty, as prayed by the high party complainant?

Judges Medal, Oreamuno and Castro Ramírez answered in the negative, on the ground that one of the high parties signatory to the Bryan-Chamorro Treaty is not subject to the jurisdiction of the Court; Judges Gutiérrez Navas and Bocanegra answered in the negative.

Twenty-fourth Question. — Will the Court grant such other and further relief in this case as is asked for in the fourth prayer of the main complaint?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered in the negative, on the ground that no such further relief has been expressly prayed for and argued in the case. Judge Gutiérrez Navas answered in the negative.

WHEREFORE the Court declares:

First. — That it is competent to take cognizance of and decide the present case brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua.

Second. — That the exceptions interposed by the high party defendant must be denied.

Third. — That the Bryan-Chamorro Treaty of August fifth, nineteen hundred and fourteen, involving the concession of a naval base in the Gulf of Fonseca, constitutes a menace to the national security of El Salvador and violates her rights of coöwnership in the waters of said Gulf in the manner, and within the limitations, specified in the foregoing act recording the votes of the Court.

Fourth. — That said treaty violates Article II and IX of the Treaty of Peace and Amity concluded at Washington by the Central American States on the twentieth of December, nineteen hundred and seven.

Fifth. — That the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to reestablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action.

Sixth. — That the Court refrains from making any pronouncement with respect to the third prayer of the original complaint.

Seventh. — That, with respect to the fourth prayer of the original complaint, the Court takes no action.

ANGEL M. BOCANEGRA,
DANIEL GUTIÉRREZ N. (NAVAS),
MANUEL CASTRO RAMÍREZ,
NICOLÁS OREAMUNO,
SATURNINO MEDAL,
MANUEL ECHEVERRÍA,

Secretary.

It appears in conclusion: that, during the course of the present action, the Department of Foreign Relations of the Republic of Honduras brought to the attention of this Court a copy of a communication it had addressed, by way of protest and for the safeguarding of its rights, on the thirtieth of September of last year, to the Ministry of Foreign Relations of the Republic of El Salvador against the text of the Salvadorean complaint that alleges coöwnership in the Gulf of Fonseca; which communication went on to declare that the Government of Honduras has not recognized the status of coöwnership with El Salvador, nor with any other republic, in the waters belonging to it in the Gulf of Fonseca. That communication was, by resolution of the Court, transcribed and sent to the high parties litigant, and in due course replies were received, from their respective Foreign Offices.

SECOND PART

EXAMINATION OF FACTS AND LAW

CHAPTER I

CONCERNING THE PEREMPTORY EXCEPTION AS TO THE COMPETENCY
OF THE COURT

Whereas: The high party defendant bases its exception to the competency of the Court because of lack of jurisdiction on two grounds of very distinct import, to wit, first: "The Government of El Salvador, in preparing its complaint, chose to ask for a decision on a new claim that had not been argued between the respective foreign offices, and thus cannot correctly say, in regard thereto, that a settlement could not be reached; wherefore, diplomatic channels not having been exhausted in an effort towards settlement thereof, the complaint cannot properly be admitted"; and, second: The Court is without jurisdiction to decide *mixed* controversies or questions such as those with which Central American nations may concern themselves in connection with interests of a Power foreign to Central America.

Article I of the convention that created the Court confers on it the amplest jurisdiction over those controversies that may arise between Central American Governments, wherein "the respective Departments of Foreign Affairs may not be able to reach an understanding." And it appears from the documents filed in the case by both high parties, that the Governments of El Salvador and Nicaragua not only had recourse to argument between their respective Foreign Offices, but exhausted that means of settlement by their notes of April 14, and July 26, 1916, wherein the two Governments contemplated the conclusion of the Bryan-Chamorro Treaty in all its many aspects, both legal and moral, and the Government of Nicaragua reached the following conclusion, which is incompatible with any idea of amicable settlement:

In conclusion, Your Excellency must permit me to observe that, in consonance with the solemn declaration contained in the note itself that the Government of El Salvador will avail itself of every means afforded to it by justice, law and existing international agreements to secure invalidation of that pact, my Government,

in its turn, expresses to Your Excellency's Government its unalterable purpose also to avail itself of all means afforded to it by justice and law to maintain inviolate the validity of that diplomatic agreement.

The argument that the efforts towards settlement were made solely in connection with the additions to the complaint is futile, for those additions do not involve a new dispute or controversy; they constitute perfectly germane amplifications of the Salvadorean claims that were fully set forth, in the note of the Foreign Office of that country, not only without reservation as to concrete points or subject-matter, but as an appeal to the cordial friendship of the Nicaraguan Government for the purpose of dissuading it from consummating the Bryan-Chamorro Treaty — which, the note pleads, “will seriously injure the primordial interests, not alone of this Republic, but of all Central America.” And it is clear that since, through diplomatic channels, efforts were resorted to that were directed against the entire legal structure of the Bryan-Chamorro Treaty, the complainant Government was justified in confining the petition contained in its complaint to such, or any of the matters in controversy, and this, without prejudice to its right — universally conceded to every plaintiff, by the laws of procedure — to amplify its prayers before the answer to the complaint brings about the quasi-contractual status of *lis pendens*; provided, of course, that such additional prayers relate, as is the case here, to matters concomitant with the injuries of which complaint is made by the high party complainant.

Whereas: What may be called the fundamental argument: that the Court has no jurisdiction over the subject-matter of this suit because it involves interests of a third nation that is not subject to the authority of the Court, is also unsound in the opinion of the judges. The jurisdiction of the Court is general as to all questions or differences that arise between two or more Central American Governments, “whatever may be their nature and whatever their origin.” This is the language of Article I of the convention, the natural interpretation whereof excludes every exception incompatible with any agreement for a judicial arbitration that is entered into without reservation, as is the case with the arbitration here intrusted to the Central American Court of Justice.

The circumstance that the Republic of the United States of North America has interests connected with the Republic of Nicaragua does not justify the latter in evading its obligation to submit herself to the

jurisdiction of the Court, which is here called upon to adjust the legal situation between two countries signatory to the Treaties of Washington, even though its jurisdictional power does not extend to a third nation the interests of which have not been controverted, and could not be controverted, without special agreement on her part.

The absolute competency of the Court is guaranteed by the fact that the Bryan-Chamorro Treaty relates immediately to the legal order created in Central America, and contracts exclusively respecting property located in Central America over which it is natural that this international court of justice should be the only authority called upon to settle controversies between two or more States arising out of an action that may be called *real*.

In carrying out its mission, it is enough that the Court shall confine itself within the scope of its peculiar power and render a decision embracing solely the rights in litigation between El Salvador and Nicaragua; for, by accepting the argument of the high party defendant, many questions that might arise among or between Central American Governments would be excluded from its cognizance and decision if weight be given to the trivial argument that a third nation foreign to the institutional system created by the Treaties of Washington possesses interests connected with the matters or questions in controversy.

To admit that argument would be to render almost negligible the judicial power of the Court, since the fact of invoking interests connected with a third nation would detract from the Court's judicial mission, which, according to the treaty, is indispensable to the object of "efficaciously guaranteeing the rights of the signatory parties and maintaining unalterably peace and harmony in their relations without being obliged to resort in any case to the employment of force." Questions of transcendental importance, having their origin in treaties entered into by a Central American Government with a foreign government would be excluded from the cognizance of the Court even though something might be stipulated therein that in concrete form might menace, violate, or imply violation of, the fundamental rights of the States or of the treaty rights that reciprocally have been conceded by the nations of the Central American isthmus. That restriction, according to the unanimous consensus of the judges' opinions, cannot be accepted by the Court because it would violate the letter and spirit of the treaty creating this Court and would constitute a germ of conflicts that might perhaps engender consequences that would be painful.

On the other hand, Article XXII of the convention confers on the Court the power to determine its competency by interpreting treaties and conventions pertinent to the matter in dispute and by applying the principles of international law — a high prerogative which, to the end that once the *potestas judicandi* is decreed, the obligatory character of its decision may not be denied, removes from the field of free arbitrament among the signatory nations the right to decide as to the competency of the Court.

By virtue of the foregoing considerations, the Court hereby declares its competency to take cognizance of and decide the action brought by the Government of El Salvador which falls within the letter and spirit of Article I of the convention referred to: providing for full judicial arbitration, without restriction as to justiciable subject-matter.

CHAPTER II

ANALYSIS OF THE ACTION

The Legal Status of the Gulf of Fonseca

Whereas: In order to fix the international legal status of the Gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography and the vital interests of the surrounding States.

The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible. first, under the Spanish dominion — from 1522, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year 1821 — then under the Federal Republic of the Center of America, which in that year attained its independence and sovereignty down to 1839; and, subsequently, on the dissolution of the Federation in that year, the States of El Salvador, Honduras and Nicaragua, in their character of autonomous nations and legitimate successors of Spain, incorporated into their respective territories, as a necessary dependency thereof for geographical reasons and purposes of common defense, both the Gulf and its archipelago, which nature had indented in that important part of the continent, in the form of a gullet.

During these three periods of the political history of Central America, the representative authorities have notoriously affirmed their peace-

ful ownership and possession in the Gulf; that is, without protest or contradiction by any nation whatsoever, and for its political organization and for police purposes, have performed acts and enacted laws having to do with the national security, the observance of health and with fiscal regulations. A secular possession such as that of the Gulf, could only have been maintained by the acquiescence of the family of nations; and in the case here at issue it is not that the *consensus gentium* is deduced from a merely passive attitude on the part of the nations, because the diplomatic history of certain Powers shows that for more than half a century they have been seeking to establish rights of their own in the Gulf for purposes of commercial policy, but always on the basis of respect for the ownership and possession which the States have maintained by virtue of their sovereign authority.

Those efforts, manifested in conventions entered into with certain Governments of Central America, or by attempts of a different import on the part of agents of those Powers, had the result, finally — and for the purpose of putting an end to repeated and dangerous controversies — of crystalizing themselves in the stipulations of the Clayton-Bulwer Treaty of April 19, 1850, between the United States and Great Britain, wherein was announced reciprocally the right to construct or maintain fortifications dominating any canal across the Isthmus, or to occupy, fortify, colonize or exercise any measure of dominion over Nicaragua, Costa Rica, the Mosquito Coast or any other part of Central America. The coveted Gulf of Fonseca, then, was protected against all danger, at least down to the time of the conclusion of the Hay-Pauncefote Treaty, which abrogated the former pact.

Therefore, whatever may have been the motives that brought about the conclusion of the Clayton-Bulwer Treaty, and whether or not those motives are the subject of divergent points of view, the fact is that that pact consecrated a principle of justice — of honorable respect for the sovereignty and independence of the weak Central American nations — which should continue to serve as the rule of action in the international legal relations respecting the Gulf of Fonseca.

The locality and geographic conditions of the Gulf should be studied in the light of the following maps that the Court has had before it: a copy of the map issued by the American Admiralty (*i.e.*, the United States Hydrographic Office, see Chart No. 973), and which, in the opinion of the engineers Barberena and Alcaine, is the best map extant of this part of the Central American coast and the one that served as

the basis of the report and opinion of those engineers; the map drawn and published in 1884 by a North American naval commission under the direction of Commander E. C. Clark; the map prepared in 1838 by Captain Sir Edward Belcher of the Royal English Navy which was used by E. G. Squier in connection with his interesting work, "Notes on Central America," published in 1850, and, finally, the map published in 1909 by the engineer E. C. Fiallos. The report and opinion of the above-mentioned engineers filed with the complaint states:

Paralleling the coast, we have traced on the Salvadorean and Nicaraguan parts that form the gullets or entrance to the Gulf, the two lines (distant twelve miles from the coast) that mark the respective limits of the zone of maritime inspection according to the generally accepted prescriptions in that connection, and it is thus clearly to be seen that those lines intercept or overlap, thus closing the Gulf, which is thereby reduced to an interior bay of purely Central American jurisdiction.

We have arrived at the same conclusion by merely considering that the entrance to the Gulf is 35 kilometers, approximately, from Amapala Point, in El Salvador, to Cosigüina Point, in Nicaragua; and that, by measuring four marine leagues, or 22,220 meters, from each of those points, the lines traced necessarily meet and dovetail; otherwise the entrance would have to be at least 44,440 meters, or nearly 10 kilometers wider than it is.

If the shortest distance between Meanguerita Island — an integral part of the Salvadorean coast — and the Peninsular of Cosigüina be taken as the points of entrance to the Gulf, the width would be 15 kilometers, which is barely equal to 8 miles; and, if the islets known as the Farallones be taken as the limit of the Nicaraguan coast on that side, the entrance would be reduced to 7 kilometers 950 meters, or some 4 miles and a little more than a quarter.

The foregoing could be reënforced from other authoritative sources, such as the Lawyers' Society of Honduras, which adopted the report of a select commission appointed to study the legal aspects of the case of the Gulf of Fonseca in relation to the Bryan-Chamorro Treaty, and which report is published in the important review of that body known as the *Foro Hondureño*, and the description given by the geographer Squier in his above-mentioned work. The report of that commission reads as follows:

The entrance is fixed by a straight line running from Cosigüina Point, in Nicaragua, to Amapala Point, in El Salvador, a distance of 19½ geographic miles or 35 kilometers and a fraction. Its coves or bays are those of Cosigüina, San Lorenzo and La Unión, and its principal islands are Tigre, Zacate Grande, Güegüensi, Exposición, the islets of Sirena, Verde, Violín, Garrobo, Coyote, Vaca, Pájaros, and Almejas, belonging to Honduras; Meanguera, Conchagüita, Meanguerita, Punta Zacate, Martín Pérez and other islets belonging to El Salvador, and the Farallones, belong-

ing to Nicaragua. Between El Salvador and Honduras no definitive treaty has been entered into marking out the two jurisdictions over the waters of this Gulf.

In order to arrive at the distances between the points pertinent to the present inquiry, we have taken as a basis — without prejudice, however, to other opinions — the map prepared and published in 1884 by American naval officers under the direction of Commander E. C. Clark, which agrees almost entirely with the Sonstern map and with Nicaragua's 1905 map, published by the *Oficina Internacional Panamericana*. The map published in Honduras in 1909 by the engineer E. C. Fiallos shows certain insignificant differences from the one we have taken for our basis.

The width of the waters in the Cove of Cosigüina, on the boundary line with Nicaragua, and drawn by the Mixed Commission of 1894, is $10\frac{1}{2}$ marine miles, or 19 kilometers. Half that distance is $5\frac{1}{4}$ miles, or 9.5 kilometers. From the coast to Amatillo the distance is approximately 17.5 kilometers. From Rosario Point, or Mony Penny, towards the southernmost point of Tigre Island, the distance is $11\frac{1}{2}$ miles or 21 kilometers. From Rosario Point to Meanguerita it is 8 $\frac{1}{2}$ miles. From Amapala Point to Rosario Point, $19\frac{1}{2}$ miles; half that distance is $9\frac{1}{4}$ miles. From Amapala Point to the Farallones the distance is $15\frac{1}{2}$ miles and from those islets to Rosario Point, 6 miles. From Meanguerita to the Farallones, 15 kilometers.

The northern and eastern coasts of this Gulf belong to Honduras, and they are more than 60 geographic or marine miles in extent. The coasts that belong to Nicaragua on the south extend for 57 miles from Amatillo Point to Cosigüina Point; and the Salvadorean coasts, to the west, extend over a distance of 25 miles. There is, therefore, in the waters of the Gulf of Fonseca, an overlapping of the jurisdictions of the States of Honduras, Nicaragua and El Salvador.

The depth of water in the Gulf varies from 14 to 25 feet at the entrance. In the interior are certain points of considerable depth and others where it does not exceed three feet. The channel for deep-sea vessels runs between Meanguerita and the Cosigüina coast, although the depth of 10 to 15 feet between Meanguera and Conchagüita also permits the passage of vessels of regular draft. These are the only entrance points towards Amapala. The entrance to La Unión for deep-sea vessels is by way of the channel lying between the Conchagua coast and the Islands of Conchagüita and Punta Zacate. Outside of these routes navigation is dangerous because of shallowness and the existence of many sandbanks. The safest anchorages at present are Amapala and La Unión. San Lorenzo and Cosigüina Bays or Coves have a mean depth of 7 feet, which permits navigation by light-draft vessels only, and at the widest part of the Gulf, which lies between Tigre Island and the Real Estuary, in Nicaragua, the mean depth is from 6 to 7 feet.

And, finally, the North American geographer makes the following statement on this subject:

The Bay of Fonseca, sometimes called the Gulf of Amapala or Gulf of Conchagua, is without dispute one of the best ports — or, rather "constellation of ports" — along the entire extent of the Pacific coast of this continent. Its greatest length is 50 miles and its mean width is 30 miles.

It will be seen that this bay lies in the great longitudinal valley comprised

WHEREFORE the Court declares:

First. — That it is competent to take cognizance of and decide the present case brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua.

Second. — That the exceptions interposed by the high party defendant must be denied.

Third. — That the Bryan-Chamorro Treaty of August fifth, nineteen hundred and fourteen, involving the concession of a naval base in the Gulf of Fonseca, constitutes a menace to the national security of El Salvador and violates her rights of coöwnership in the waters of said Gulf in the manner, and within the limitations, specified in the foregoing act recording the votes of the Court.

Fourth. — That said treaty violates Article II and IX of the Treaty of Peace and Amity concluded at Washington by the Central American States on the twentieth of December, nineteen hundred and seven.

Fifth. — That the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to reëstablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action.

Sixth. — That the Court refrains from making any pronouncement with respect to the third prayer of the original complaint.

Seventh. — That, with respect to the fourth prayer of the original complaint, the Court takes no action.

ANGEL M. BOCANEGRA,
DANIEL GUTIÉRREZ N. (NAVAS),
MANUEL CASTRO RAMÍREZ,
NICOLÁS OREAMUNO,
SATURNINO MEDAL,
MANUEL ECHEVERRÍA,

Secretary.

It appears in conclusion: that, during the course of the present action, the Department of Foreign Relations of the Republic of Honduras brought to the attention of this Court a copy of a communication it had addressed, by way of protest and for the safeguarding of its rights, on the thirtieth of September of last year, to the Ministry of Foreign Relations of the Republic of El Salvador against the text of the Salvadorean complaint that alleges coöwnership in the Gulf of Fonseca; which communication went on to declare that the Government of Honduras has not recognized the status of coöwnership with El Salvador, nor with any other republic, in the waters belonging to it in the Gulf of Fonseca. That communication was, by resolution of the Court, transcribed and sent to the high parties litigant, and in due course replies were received, from their respective Foreign Offices.

SECOND PART

EXAMINATION OF FACTS AND LAW

CHAPTER I

CONCERNING THE PEREMPTORY EXCEPTION AS TO THE COMPETENCY
OF THE COURT

Whereas: The high party defendant bases its exception to the competency of the Court because of lack of jurisdiction on two grounds of very distinct import, to wit, first: "The Government of El Salvador, in preparing its complaint, chose to ask for a decision on a new claim that had not been argued between the respective foreign offices, and thus cannot correctly say, in regard thereto, that a settlement could not be reached; wherefore, diplomatic channels not having been exhausted in an effort towards settlement thereof, the complaint cannot properly be admitted"; and, second: The Court is without jurisdiction to decide *mixed* controversies or questions such as those with which Central American nations may concern themselves in connection with interests of a Power foreign to Central America.

Article I of the convention that created the Court confers on it the amplest jurisdiction over those controversies that may arise between Central American Governments, wherein "the respective Departments of Foreign Affairs may not be able to reach an understanding." And it appears from the documents filed in the case by both high parties, that the Governments of El Salvador and Nicaragua not only had recourse to argument between their respective Foreign Offices, but exhausted that means of settlement by their notes of April 14, and July 26, 1916, wherein the two Governments contemplated the conclusion of the Bryan-Chamorro Treaty in all its many aspects, both legal and moral, and the Government of Nicaragua reached the following conclusion, which is incompatible with any idea of amicable settlement:

In conclusion, Your Excellency must permit me to observe that, in consonance with the solemn declaration contained in the note itself that the Government of El Salvador will avail itself of every means afforded to it by justice, law and existing international agreements to secure invalidation of that pact, my Government,

in its turn, expresses to Your Excellency's Government its unalterable purpose also to avail itself of all means afforded to it by justice and law to maintain inviolate the validity of that diplomatic agreement.

The argument that the efforts towards settlement were made solely in connection with the additions to the complaint is futile, for those additions do not involve a new dispute or controversy; they constitute perfectly germane amplifications of the Salvadorean claims that were fully set forth, in the note of the Foreign Office of that country, not only without reservation as to concrete points or subject-matter, but as an appeal to the cordial friendship of the Nicaraguan Government for the purpose of dissuading it from consummating the Bryan-Chamorro Treaty — which, the note pleads, “will seriously injure the primordial interests, not alone of this Republic, but of all Central America.” And it is clear that since, through diplomatic channels, efforts were resorted to that were directed against the entire legal structure of the Bryan-Chamorro Treaty, the complainant Government was justified in confining the petition contained in its complaint to such, or any of the matters in controversy, and this, without prejudice to its right — universally conceded to every plaintiff, by the laws of procedure — to amplify its prayers before the answer to the complaint brings about the quasi-contractual status of *lis pendens*; provided, of course, that such additional prayers relate, as is the case here, to matters concomitant with the injuries of which complaint is made by the high party complainant.

Whereas: What may be called the fundamental argument: that the Court has no jurisdiction over the subject-matter of this suit because it involves interests of a third nation that is not subject to the authority of the Court, is also unsound in the opinion of the judges. The jurisdiction of the Court is general as to all questions or differences that arise between two or more Central American Governments, “whatever may be their nature and whatever their origin.” This is the language of Article I of the convention, the natural interpretation whereof excludes every exception incompatible with any agreement for a judicial arbitration that is entered into without reservation, as is the case with the arbitration here intrusted to the Central American Court of Justice.

The circumstance that the Republic of the United States of North America has interests connected with the Republic of Nicaragua does not justify the latter in evading its obligation to submit herself to the

jurisdiction of the Court, which is here called upon to adjust the legal situation between two countries signatory to the Treaties of Washington, even though its jurisdictional power does not extend to a third nation the interests of which have not been controverted, and could not be controverted, without special agreement on her part.

The absolute competency of the Court is guaranteed by the fact that the Bryan-Chamorro Treaty relates immediately to the legal order created in Central America, and contracts exclusively respecting property located in Central America over which it is natural that this international court of justice should be the only authority called upon to settle controversies between two or more States arising out of an action that may be called *real*.

In carrying out its mission, it is enough that the Court shall confine itself within the scope of its peculiar power and render a decision embracing solely the rights in litigation between El Salvador and Nicaragua; for, by accepting the argument of the high party defendant, many questions that might arise among or between Central American Governments would be excluded from its cognizance and decision if weight be given to the trivial argument that a third nation foreign to the institutional system created by the Treaties of Washington possesses interests connected with the matters or questions in controversy.

To admit that argument would be to render almost negligible the judicial power of the Court, since the fact of invoking interests connected with a third nation would detract from the Court's judicial mission, which, according to the treaty, is indispensable to the object of "efficaciously guaranteeing the rights of the signatory parties and maintaining unalterably peace and harmony in their relations without being obliged to resort in any case to the employment of force." Questions of transcendental importance, having their origin in treaties entered into by a Central American Government with a foreign government would be excluded from the cognizance of the Court even though something might be stipulated therein that in concrete form might menace, violate, or imply violation of, the fundamental rights of the States or of the treaty rights that reciprocally have been conceded by the nations of the Central American isthmus. That restriction, according to the unanimous consensus of the judges' opinions, cannot be accepted by the Court because it would violate the letter and spirit of the treaty creating this Court and would constitute a germ of conflicts that might perhaps engender consequences that would be painful.

controversy, are "geographic bays" irrespective of the width of their entrances; that they are "exceptions" and, according to the international writer cited, "appear in many treaties, and the doctrine expressly recognizes them." "The character of a bay," said the arbitral tribunal, "is subject to conditions that concern the interests of the territorial sovereign to a more intimate and important extent than those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry, are all vitally concerned with the control of the bays penetrating the national coast line." Dr. Drago, commenting on the award in his dissent, said:

In what refers to bays it has been proposed as a general rule that the marginal belt of territorial waters should follow the sinuosities of the coast, so that the marginal belt being of three miles, only such bays should be held as territorial as have an entrance not wider than six miles.

If the marginal belt be traced geographically along the sinuosities of the coast, it will be noted that at the point of entrance where the two lateral zones meet, there is a small triangle, or funnel-shaped figure, the delimitation of which would be very difficult in actual practice. For reasons of convenience, and in order to avoid involuntary trespassing on fishing waters, many recent treaties, particularly those of Great Britain, have extended the width of the entrance to ten miles, measured between the opposite points towards the open sea.

But this refers to common or ordinary bays, and not to those which, in our dissent, we have called "historic bays." As has been seen, the principle that underlies all the rules and jurisdictional distances is no other than that of paramount necessity to protect fiscal interests, persons and territory of the nation that claims sovereignty over the contiguous seas and over the gulfs, bays and coves that penetrate its coast line.

From this point of view a fundamental distinction instantly becomes apparent. Not all of the entrances from the sea are of equal importance for defense, nor do they all demand the same degree of protection. Some are far from the centers of population, in places uninhabited or inaccessible and without fisheries or other exploitable wealth; and some are so intimately involved in the very vitals of a nation that any departure from full, absolute and indisputable possession thereof would be intolerable. Delaware Bay, which stands as the entrance to the great port of Philadelphia, Chesapeake Bay, which lies in a populous district of the United States, Conception Bay, in Newfoundland, from which, by an easy descent, the capital of that colony would be vulnerable — all are in that class.

Dr. Drago cites the opinions of Chancellor Kent, Secretaries of State Pickering, Buchanan and John Davis, and concludes his commentary by saying:

The United States appear to have abandoned that exaggerated theory (referring to the doctrine of promontories). At least, in the case before us, they adhere to the

strict rule of the six-mile entrance for the generality of bays; but they except, as in necessity bound to do, their own vital bays, and cite a great collection of authorities and arguments in support of their exception. Those excepted bays appear in many treaties and the doctrine expressly recognizes them. . . . Continued use, necessities of self-defense and the will to appropriate expressly stated, must have greater weight in this case than in any other in giving effect to the theory of acquisition by prescription, and as placing historic bays in a special and separate category, wherein ownership belongs to the embracing country, which, having made the declaration of its sovereignty, has affirmed possession and incorporated them into its dominion with the acquiescence of the other nations.

And, finally, it is worthy of consideration that the Government of the United States itself, in the note addressed by the Department of State on the 18th of February, 1914, to the Minister of El Salvador at Washington said categorically:

In your protest the position is taken that the Gulf of Fonseca is a territorial bay whose waters are within the jurisdiction of the bordering States. This position the Department is not disposed to controvert.

This evidently implies an express recognition of the unequivocal claim of sovereignty set up by the three States that surround the Gulf. The Secretary of State could do no less than follow the traditional doctrine proclaimed by other representatives and statesmen of the great North American nation and apply it to the *vital bays* that indent the extensive coasts of the federal territory.

Whereas: in regard to the coöwnership in the Gulf of Fonseca claimed by the high party complainant, and in view of what is alleged on that point by the high party defendant, the question of division, demarcation or delimitation of jurisdictions between the provinces that constituted the patrimony of the Spanish Crown must be examined in the light of historical truth in order to harmonize their conclusions with the legal relations that now govern among the riparian States. A series of controversies over purely territorial boundaries demonstrates that the royal *cedulas* traced topographical lines based on the claims of the governors of the political divisions who knew little about their geographical conditions, wherefore arose many errors as to places, directions and distances. These circumstances, on the one hand, and, on the other, the secondary consideration that monarchs were not interested to prevent jurisdictional transgressions, since the patrimony of those political divisions pertained to a single proprietor or lord, resulted in the fact that the demarcations were in general confused and lacking in detail as is very properly said by counsel for Nicaragua. Proof

of this lies in the fact that in their autonomous lives the Central American countries, and even the other countries of Latin America, have found themselves under the supreme necessity to mark out and make clear their frontiers in order to preserve harmony among the sister peoples, and in the failure of his Majesty the King of Spain, Don Alfonso XIII, in rendering his arbitral award in the boundary arbitration between Honduras and Nicaragua, to give weight to the royal *cedula* because the capitulation with Diego Gutiérrez of January 11, 1541, referred to territories with which it had nothing to do, such as Honduras and Nicaragua.

With respect to the Gulf of Fonseca, it must be noted that, as no fact of first importance had disturbed the cordial harmony of the States that surround it in the use and benefits of its waters, the Governments concerned themselves solely with fixing upon portions thereof as to which the exercise of the rights of neighboring countries might involve them in conflict. Thus it was that by mixed commissions, in 1884, between El Salvador and Honduras, and, in 1900, between the latter and Nicaragua, in marking out and making clear their respective land frontiers, they reached the point of drawing divisionary lines that started from certain coves and extended to a certain point in the Gulf. The first line did not endure because the Honduran Congress rejected the convention relating to land boundaries, signed at San Miguel, in the Republic of El Salvador, on the 10th of April, 1884, on the ground, among others, that the commission exceeded its powers by extending its operations to the Gulf, a course unauthorized by the Honduran Government (Legislative Decree of 1885). The division adjusted with Nicaragua is the only one that still subsists. The line of this division appears on the maps here presented as running to a point midway between the southern part of Tigre Island and the northern part of Cosigüina Point (Mony Penny, or Rosario Point), thus leaving undivided a considerable expanse of waters belonging to the riparian States which extends as far as the Gulf's great outside entrance, which measures 35 kilometers in width.

Barrois's Dictionary of Legislation and Jurisprudence defines "community" as the quality that makes a thing common, so that any one may participate freely in its use; "common" things are those which, belonging privately to no one, belong or extend to many, all of whom enjoy to equal right to make use of them; "possession in common" is the enjoyment of or possession by two or more persons of the same

thing undivided, that is, in such way that the thing in its entirety belongs to all, none being able to specify his part.

The high party defendant recognizes that no demarcation existed among the countries adjacent to the Gulf prior to their constitution as independent entities, notwithstanding the fact that demarcations were then not unknown; but no proof whatever is adduced to show that subsequently those same States ever effected a complete division of all the waters embraced therein, for, although there was a division made with Honduras in 1900 — which has been here invoked — the line drawn, according to the map of the engineer Fiallos (who was a member of the Mixed Commission), only extends as far as a point midway between Tigre Island and Cosigüina Point, thus leaving undivided, as already stated, a considerable portion of the waters embraced between the line drawn from Amapala Point to Cosigüina Point and the terminal point of the division between Honduras and Nicaragua.

Consequently, it must be concluded that, with the exception of that part, the rest of the waters of the Gulf have remained undivided and in a state of community between El Salvador and Nicaragua, and that, by reason of the particular configuration of the Gulf, those waters, though remaining face to face, were, as declared in the report of the engineers Baraberena and Alcaine and as recognized by the high party defendant, confounded by overlapping.

And, since it is true in principle that the absence of demarcation always results in community, it is self-evident that every community necessarily presupposes, in the legal sense, the absence of partition. This community in the Gulf has continued to exist by virtue of continued and peaceful use of it by the riparian States, and this is shown most clearly by the overlapping of jurisdictions in the zone in which both litigant countries have been exercising their rights of *imperium*, though from this it is deduced that that legal status does not exist in the three marine miles that form the littoral on the coasts of the mainland and islands which belong to the States separately and over which they exercise ownership and possession both exclusive and absolute.

Similarly, no community exists in those waters that are embraced between islands and promontories the proximity of which to each other, in the littoral zones of exclusive ownership, results in an overlapping of the jurisdictions of the States, for in that case the demarcations must result from an arrangement in conformity with the recognized principles of international law. It is, therefore, evident that the exercise

of jurisdiction in the unpartitioned waters is based on the legal nature of the Gulf, which makes them common, and in the all-important necessity to protect and defend the vital interests of commerce and industries, these being indispensable to national development and prosperity.

A change in the theory of the use of the common waters of the Gulf — which waters, because of their nature, must respond to the reciprocal needs of the adjacent States — would imply nullification of jurisdictional rights that should be exercised with strict equality and in harmony with the interests of the community. One coparcener cannot lawfully alter, or deliver into the hands of an outsider, or even share with it, the use and enjoyment of the thing held in common, even though advantage might result therefrom to the other coparceners, unless the consent of all is obtained. Wherefore, in the case here at issue, the concession of the naval base in the Gulf granted by the Government of Nicaragua to the United States, at such point on Nicaraguan territory as the concessionary may select (Article II of the Bryan-Chamorro Treaty), necessarily presupposing, as it does, occupation, use and enjoyment of waters in which El Salvador possesses a right of co-sovereignty, would have the practical effect of nullifying, or at least restricting, those primordial rights; because American warships in those waters, and all that depends on the naval base as well as territory, as such, and water highways, would be subject exclusively to the laws and sovereign authority of the United States (Article II of the above-mentioned treaty); in other words, the concession in question grafts a foreign Power upon a part of the continent that has been, and is, subject to the exclusive and undivided ownership of three sister nations and thus places in grave danger the vital interests that they of necessity must possess and protect for their own development.

The universal principles that govern community in things are perfectly applicable to the Gulf of Fonseca, from the international point of view. Community is not common in the relations among nations, but it is not an inconceivable or an isolated fact. "In public law," says Heffter, "there are certain acts and relations which, independently of agreements, and in a manner analogous to the quasi-contracts of civil law, produce effects similar to those arising from treaties. (3) Of an accidental community (*communio rei vel juris*), in a case wherein a country belongs at once to various states or sovereignties, or in the event of an acquisition of a thing in common over which the dispositions of the civil laws of a single country are not applicable. In

such cases recourse must be had to principles heretofore explained relating to treaties of association, which principles are: that of equality of rights and obligations, at least where a portion shall have been previously stipulated; that of free enjoyment of a thing by each coparcener with a proviso against mutual injuries; and, finally, the principle that forbids the disposal of a thing completely without the consent of the other coparceners, the power so to convey being limited to the portion corresponding to each. The dissolution of a community can only take place by means of a treaty or accidentally."

The same opinion prevails among other authorities, such as Fiore, Bluntschli, Perels, Rivier, E. Nys, and the Bolivian statesman Federico Díaz Medina, who cites the case of Prussia and Austria when, by the Treaty of Vienna of 1864, they acquired from Denmark an undivided sovereignty over the Duchies of Schleswig-Holstein, and the case of Chile and Bolivia, who, by the treaty of 1876, recognized their reciprocal and definitive territorial ownership in the 24th parallel of latitude and at the same time community of ownership in, and the right to exploit, the guano deposits lying between the 23d and 24th parallels — an agreement that was superseded by the treaty of armistice of 1884.

Also from the point of view of various civil laws, among them those of Central America, and especially those of Nicaragua, in the light whereof the question of community in the Gulf may be contemplated. Article 1700 of the Civil Code of the Republic last mentioned gives to the coparcener of a thing held in common full ownership over his part, together with its emblements and profits, including the right freely to sell, grant or mortgage, provided no right personal to another be involved. But naturally that power should be, and is in fact, limited by Article 1710, which provides:

No coparcener may take for himself or give to a third party real estate held in common, in whole or part, in usufruct or for use, habitation or rental in the absence of agreement with the other interested parties.

A conflict of meaning is apparent here which, however, is perfectly explicable by an error of the copyist as shown by a comparison of the Nicaraguan article with Article 399 of the Civil Code of Spain, which served as a model for the former. The latter gives the same power provided in the other but prescribes that "the effect of alienation or mortgage, with respect to coowners, shall be limited to the portion adjudicated in the partition *on the extinction of the community.*" The

article of the Nicaraguan Code omitted the complementary and conditional proviso; and proof of this lies in the fact that, in spite of providing for free disposition on the part of the coparcener, it excepts the personal rights to usufruct, use, occupation and leasing which, like all the others, are subject to the following rules of the Nicaraguan Code:

ARTICLE 1695. — Each coparcener may make use of the things held in common, provided also that he use them for the usual purposes for which they are destined, and that such use be not against the interests of the community.

ARTICLE 1698. — None of the coparceners may make any change in the thing held in common, even though such change would operate to the advantage of all, in the absence of their consent thereto.

ARTICLE 1699. — The agreement of the majority of the coparceners is necessary for the administration and better enjoyment of the thing held in common.

Whereas: The high parties contestant are in accord respecting the existence of the zone of maritime inspection in the Gulf of Fonseca, wherein the States exercise the right of *imperium* beyond their *absolute* jurisdiction over the sea for purposes fiscal and for purposes of national security; but the high party defendant claims that, because an unsurmountable barrier attributable to alien sovereignty stands in the way, that right should be exercised on the high sea directly opposite the respective coasts of the several countries, and not to the right and left over portions of the territorial sea belonging to others, whereas the high party complainant claims that that zone exists as well within the Gulf as without.

The Court has admitted the latter claim because it finds that it is supported by Articles 2, 13 (first paragraph) and 16 of the Law of Navigation and Marine of the Republic of El Salvador, which read as follows:

ARTICLE 2. — Estuaries, coves and bays and the contiguous open sea to a distance of one marine league, measured from extreme low tide, are of national ownership; but the police power, for purposes connected with the country's security and the enforcement of the fiscal laws, extends to a distance of four marine leagues, measured from extreme low tide.

ARTICLE 13. — The territorial sea of the Republic is divided into five maritime departments as follows:

First. — The Maritime Department of La Unión, comprising the Bay of Conchagua, that part of the Gulf of Fonseca wherein are situated the Salvadorean islands, and the territorial sea as far as the parallel of the eastern mouth of the San Miguel River.

ARTICLE 16. — All officers exercising marine command will enforce the nation's police power over the four marine leagues mentioned in Article 2, within the limits

indicated by the prolongations of the parallels that mark out the respective departments.

From the above-quoted provision it may be deduced without effort that the zone of inspection should be measured in the same manner as the littoral marine league, that is to say, from the line of extreme low tide; and, as that league, according to the principles of law, must be measured in connection with the sinuosities of the coast, so also that zone, which is a prolongation of the former, must follow the same direction. The fact that the waters of the Gulf belong to the three States that surround them has not operated to prevent the existence of a second zone that tends to protect the rights of each State with respect to the others, under regulations, which, as the publicist, Don Andrés Bello, says, "are concerned more immediately with their prosperity and well-being"; because, considering their present political organization, the States contiguous to the Gulf possess among themselves rights and duties of reciprocal application in the use and enjoyment of the non-littoral waters, and because, the merchant vessels of all nations possessing, as they do, the right of *uso inocente* over those waters, the right of the States to exercise the police power and powers incident to national security and fiscal matters off their respective coasts is correlative to those rights. The overlapping that would result from continuing the prolongation of the lines towards the interior of the Gulf, would demonstrate the necessity of settling that collision of interests by means of treaties between the respective governments and, furthermore, the imperative necessity of avoiding an upsetting of the situation by other acts distinct from those exercised up to the present time with the reciprocal acquiescence of the co-owners of the Gulf.

And even in the contrary hypothesis — that is, assuming, as claimed by the high party defendant, that the right of *imperium* can be exercised directly off the coast only, taking for base the thirty-five kilometer line from Amapala Point, in El Salvador, to Cosigüina Point, in Nicaragua, and, therefore, ignoring the question of the right of ownership in the interior of the Gulf — the fact remains that the non-littoral waters preserve the same legal status of community as among the co-owners, subject only to certain fixed restrictions in the respective laws and regulations concerning use by outsiders. That claim the Court has been unable to admit, because the obligatory character possessed by the Laws of Navigation and Marine, of El Salvador, which were

enacted to safeguard in the Gulf the rights and interests of the Republic, cannot be ignored, and because, furthermore, those laws conform to the generally admitted principles of international law in regard to the points that are the subjects of those special provisions.

Whereas: The legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore, recognized as coowners of its waters, except as to the littoral marine league which is the exclusive property of each, and with regard to the coownership existing between the States here litigant, the Court, in voting on the fourteenth point of the questionnaire, took into account the fact that as to a portion of the non-littoral waters of the Gulf there was an overlapping or confusion of jurisdiction in matters pertaining to inspection for police and fiscal purposes and purposes of national security, and that, as to another portion thereof, it is possible that no such overlapping and confusion takes place. The Court, therefore, has decided that as between El Salvador and Nicaragua coownership exists with respect to both portions, since they are both within the Gulf; with the express proviso, however, that the rights pertaining to Honduras as coparcener in those portions are not affected by that decision.

Whereas: In regard to the protest addressed by the Government of Honduras to the Government of El Salvador, copy of which has been brought to the attention of the Court in this case by his excellency the Minister of Foreign Relations of the former Government, the Court can do no less than accord to it the full effect claimed, therefore, by that high officer in his report of January 6, 1917, to the national congress of his country concerning the conduct of affairs of the foreign relations branch of the Executive power. The paragraphs that deal with this subject read as follows:

The Government of Honduras, although it disclaimed a purpose to oppose in any manner the steps being taken by the sister Republic of El Salvador in this delicate matter, nevertheless believed it to be its duty to protest, and did protest, against the allegation of the complaint referred to, wherein coownership in all of the waters of the Gulf of Fonseca is claimed on the ground of the status of community among the three riparian Republics even as to the waters contiguous to the coasts and islands of Honduras, over which extends the undisputed sovereignty of the Republic as exclusive owner thereof, and in which that Republic has exercised, and now exercises, jurisdiction, as is recognized in the public documents of the Government of El Salvador itself.

The Government is of the opinion that whatever may be the ultimate conclusion as to the legal status of the Gulf of Fonseca outside the territorial waters, coownership over those waters by any other republic cannot be recognized without compromising the integrity of the territory which the Constitution brings under the safeguards of the Powers of the State.

As was to have been expected, the Government of El Salvador took the protest mentioned into consideration and gave to this Government frank and satisfactory evidence of its full justification, to that end accrediting thereto the Confidential Agent, Dr. Don Manuel Delgado, with whom an adjustment was signed, which, when approved by the Government of El Salvador, will put an end to the differences that have arisen and safeguard the rights of this Republic.

CHAPTER III

CONCERNING THE ESTABLISHMENT OF A NAVAL BASE

Whereas: The legal status of the Gulf of Fonseca as an *historic or vital bay*, having already been established by its historical, geographical and sociological antecedents, the Court will now proceed to examine that legal status in relation to the stipulation of the Bryan-Chamorro Treaty which refers to a naval base and which reads as follows:

ART. II. To enable the Government of the United States to protect the Panama Canal and the proprietary rights granted to the Government of the United States by the foregoing article, and also to enable the Government of the United States to take any measure necessary to the ends contemplated herein, the Government of Nicaragua hereby leases for a term of 99 years to the Government of the United States, the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island; and the Government of Nicaragua further grants to the Government of the United States for a like period of 99 years the right to establish, operate, and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select. The Government of the United States shall have the option of renewing for a further term of 99 years the above leases and grants upon the expiration of their respective terms, it being expressly agreed that the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof.

The treaty, then, conveys a concession, in the form of a renewable lease, for the exploitation and maintenance of a naval base at a point on Nicaraguan territory in the Gulf of Fonseca, to be designated by the Government of the United States; and, considering the legal status of that Gulf and the extremely valuable interests possessed by El Salvador therein, it is proper here to determine whether the establish-

ment of a naval base at any point on the borders of that closed sea would menace the security of that Republic and endanger its national integrity.

A distinguishing characteristic of all closed or territorial bays is, in the opinion of the text writers, the exclusive possession enjoyed in its waters by the states that own its coasts and which is exercised for the purpose of safeguarding the rights of territorial defense and the rights that relate to their vital economic and commercial interests. The sovereigns of the territory extend the exercise of their *imperium* beyond the *maritime littoral* in such a bay and extend their protection throughout the waters comprised within the bay which nature intrusts to their moral and material domination as though those waters came under their complete ownership.

But without these circumstances, it would still be necessary to hold that the establishment of a naval base inside the Gulf would be a menace to the Republic of El Salvador, even though that base were located on the *maritime littoral* of the Republic of Nicaragua, since though the Government of that Republic may never, during its international life, have performed any official act that might have implied a menace to the Salvadorean nation.

The function of sovereignty in a state is neither unrestricted nor unlimited. It extends as far as the sovereign rights of other states. Bluntschli tells us that "sovereignty does not imply absolute independence or absolute liberty." "States," he says, "are not absolute beings but entities whose rights are limited"; and he adds that a state may not claim more than such independence and liberty as is compatible with the necessary organization of humanity, with the independence of other states, and with the ties that bind states together. (Nys, *Le Droit International*, Vol. I, p. 380.)

This doctrine takes on added moral and legal force when applied to such Central American countries as El Salvador, Honduras and Nicaragua, because in each independence and sovereignty with respect to the Gulf of Fonseca are limited by the concurrence of rights which carries with it, as a logical postulate, a reciprocal limitation.

To invoke the attributes of sovereignty in justification of acts that may result in injury or danger to another country is to ignore the principle of the *independence* of states which imposes upon them mutual respect and requires them to abstain from any act that might involve injury, even though merely potential, to the fundamental rights of the other international entities which, as in the case of individuals, possess

the right to live and develop themselves without injury to each other; and, if those principles be deep-rooted in international life, they take on a greater importance when applied to Central American countries, which on certain occasions have incorporated those postulates as basic principles of their public law.

The Assembly of Plenipotentiaries that met at this capital [of Costa Rica] in 1906 fixed as the point of departure for the discussions that preceded the General Treaty, a solemn Declaration of Principles consecrated by the Governments as canons of Central American international public law; among these is the following: "II. — The solidarity of the interests that relate to the independence and sovereignty of Central America, considered as a single nation."

That declaration, like the others adopted at the same time, is of high moral value, because in the protocols adopted at the Conferences of Washington it appears that the stipulation of the Treaty of San José served as the cementing basis of the system of law created in the treaties there subscribed in 1907 and now in force.

A reciprocal duty is entailed upon the Governments of El Salvador and Nicaragua to guard those supreme interests which are confided to the custody of all the sister countries; for, were that not so, it would be enough for the Court, in order to declare the naval base granted in the Bryan-Chamorro Treaty to be a menace to El Salvador's security and vital interests, to take into consideration the fact that a naval base was stipulated for in the neighborhood of the Republic of El Salvador, the establishment and development of which would make necessary the use of common waters in the Gulf of Fonseca and the construction of engineering works, the accumulation of war material and the installation of barracks in places which, because of the topography of the land, would completely dominate Salvadorean territory.

In the opinion of the Court, the Agadir case is perfectly applicable to the argument maintained by the high party complainant. It matters not that in that case the parties who claimed that their rights were "menaced" were great military Powers. The proposition was there adopted as a fundamental principle of public law that all states are naturally equal and that they are under the same obligations and enjoy the same rights. "The relative magnitude," says Sir William Scott, referring to sovereign states, "creates no distinction of right, and any difference that may be claimed in respect to that basis must be considered as a usurpation." (Calvo, *Derecho Internacional*, p. 197.)

... occasions by ... respect due to na- ...

... Mr. Root, at the Pan- ...

... of the smallest and weakest mem- ... as those of the greatest ... the chief guaranty of the weak ...

... by their author, in 1916, at the ...

... at the Hague in 1907, the principle ... was adopted in obligatory form:

... that can never be denied to the world reunion ... against all attack the great principle ... A certain chapter of the proceedings of that ... attempt to impose, by the ... of the strong, by creating original means ... of an independent jurisdiction.

... was great and the opposition positive and ... a change in the society of nations and ... of world struggle, the ma- ... as well as small, would have broken up the Conference ... *La Segunda Conferencia de la Paz*, ...

... put forth on this point by counsel ... are ineffectual when he points out ... great military Powers were involved, among ... and effective war is a constant menace, ... base in the Gulf of Fonseca, small ... involved, as to which neither clashes nor ... States are to be thought of.

... America shows that the principle of nationali- ... by the public power; and these were not ... but by obedience to the sociolog- ... development of ethnical unities ...

... that in the year 1854, in view of the ... *de la Isla del Tigre en 1854*, by ... the official documents that relate ... of El Salvador.

fear that the Honduran Government would alienate Tigre Island, in the Gulf of Fonseca, and turn it over to a foreign government, Guatemala, Costa Rica and El Salvador lodged a formal protest with the Honduran Department of Foreign Relations. "The matter in question compromises, not only the nationality and independence of Honduras, but that of all Central America," said the Guatemalan Minister Señor Aycinena, in his note.

The Costa Rican Minister, Señor Calvo, after certain pertinent reflections, stated that:

The fact denounced by the official press of El Salvador and communicated to this Department by the Foreign Office at Cojutepeque that Tigre Island had been conveyed to Mr. Follin, who held himself forth as the American Agent, and the equally manifest intention of selling other parts of Central American territory, bears the character of *antinationalism* that affects the security of this part of the continent and forces the neighboring states to intervene in opposition to contracts that compromise their own future integrity as well as that of the contracting state.

As a government, that of Honduras is as independent as any other and may exercise its sovereignty and modify it as it pleases; but, as a member of the society of Central America, title to which it has so often descanted upon in these later times, it has no right to exercise its sovereignty at the cost of the whole, of which it is no more than a small part.

His Excellency Minister Gómez, in his turn, said:

The Government of El Salvador believes that the transfer of our coasts or islands into foreign hands imports imminent or remote loss of the independence of those countries, etc.

The documents referred to also show that to those protests the Government of Honduras replied by declaring that the fears suggested were unfounded; but that, for the purpose of avoiding the anticipated danger, it had, on a date prior to the protests, issued a declaration making clear its purpose, as follows: "That the State was not alienating, and could not alienate, the rights of ownership and sovereignty that it possessed over the said island."

This attitude of the Governments of Central America in support of the principle of nationalities is not unique on the American continents. It was also asserted by the Government of the Republic of Chile when it feared that the Government of Ecuador would convey the Galápagos Islands to the United States.

The diplomatic steps taken in that matter, in the year 1869, gave rise to the protocol parleys that culminated in the express declaration of the Government of Ecuador that such alienation was not intended;

and, alluding to that important incident of South American diplomacy, Don Aurelio Bascuñán Montes said, in his valuable *Miscelánea histórico-diplomática* presented to the Fourth Scientific Congress (First Pan-American):

The Minister of Foreign Relations, Señor Amunátegui, reiterated his accord with the facts set forth, that constituted a guarantee of the correct and loyal procedure of a government bound to Chile by so many ties, and that he felt that he might be excused from giving further reasons, since, according to the declarations of the Ecuadorian Minister Plenipotentiary, there was no ground for belief that the Government of that sister Republic had any idea of entering into such a transaction.

Such is the extract from the Flores-Amunátegui protocol conference of December 31, 1869.

This was not the first time that the Galápagos matter had occupied the attention of the Pacific Republics.

Minister Flores, in the course of his protocolized and detailed declaration of 1869, alludes to the mission of the Chilean Minister, Don José Francisco Gana to Quito, in the year 1855, to settle that same question, a mission that was of the greatest importance, judging from the following paragraph, which President Don Manuel Montt used in his inaugural address before the legislative body in 1856:

"The extraordinary mission sent to Ecuador in the beginning of last year has returned home after faithfully carrying out the views of the Government. The convention of November 20, 1854, referring to the Galápagos Islands, has remained without effect. The Ecuadorian Government, with dignity and caution has dissipated the anxieties caused among the Republics of the continent by certain stipulations of that convention."

The antecedents invoked show that the proclamation of the Monroe Doctrine in the year 1823 did not prevent the American countries from exercising the unavoidable duty of looking after the integrity and defense of their territories, for that celebrated declaration, unquestionably of the highest interest, consecrates the express recognition of "the free and independent condition which they (the American continents) have assumed and maintain"; but it does not involve an international tutelage that confides the defense of the continent against all attempts at colonization — in a unique and exclusive form — to the military and naval power of the United States, to the exclusion of and ignoring the duties that pertain to the other Latin-American Republics. That proposition does not comport with the solemn declarations of the statesmen of the United States, repeated on many memorable occasions, and much less could it constitute an obligatory tie for the Republic of El Salvador, which is not bound in contractual form to recognize even an authentic interpretation of the doctrine of President Monroe.

Whether the concession and operation of a naval base may be, as maintained by counsel for the high party defendant, for the greater welfare, security and guaranty of the Isthmian countries, or whether it signifies, as alleged by the high party complainant, a cause for vexation and worry, and a source of danger to its autonomy, is a question of purely political portent that conflicts with the tendencies or plans of the Government of the United States, an international entity not subject to the jurisdiction of this Court. It is enough for its juridico-arbitral finality to consider, in its true weight, the moral obligation also imposed by treaties and express laws to maintain the integrity of Nicaraguan territory and to preserve its republican system free from all foreign sovereignty—however noble and disinterested it may be—in order to estimate the menace to the security of El Salvador resulting from the establishment of a naval base in the Gulf of Fonseca provided for, not in anticipation of a state of peace, but in anticipation of a state of war which, should it come, would convert the maritime and land territory of that Republic into a field of military operations subject to all the attendant risks and havoc, besides rendering nugatory El Salvador's duties of neutrality to the whole extent specified in the Hague Convention.

In support of the Court's conclusion that the establishment of a naval base at any point on that interior and closed sea would menace the natural security of El Salvador, a great many historic precedents could be invoked, and a needlessly prolix collation made of the uniform doctrines laid down by the publicists; but the Court does not think that this is necessary in a matter so clear in the light of the principles of science. It confines itself, therefore, in concluding this section, to quoting two principal conclusions reached by the Institute of International Law at its first session in Washington on the 6th of January, 1916, on the occasion of the solemn Declaration of the Rights and Duties of Nations, as follows:

I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right, nor justifies the act, of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.

V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative and the right of one is the duty of all to observe.¹

¹ Translation corrected to conform to official English text of Declaration published in this JOURNAL for January, 1916 (Vol. 10), pp. 125 and 126. — Ed.

CHAPTER IV

THE PRIMORDIAL INTERESTS OF EL SALVADOR AS A CENTRAL AMERICAN STATE

It is also unquestionable that the Bryan-Chamorro Treaty violates the primordial interests of the Republic of El Salvador as a Central American State and that that moral violation results from the fact that the Government of Nicaragua ceded to the United States an integral part of Nicaragua's territory when it conveyed a naval base in the Gulf of Fonseca and leased Great Corn Island and Little Corn Island in the Atlantic, turning those territories over to the complete domination of the sovereignty of the concessionary nation.

By virtue of the beautiful traditions of history the peoples of the Central American Isthmus make a *moral whole*, and, although, at present divided into five independent States, they have not broken the strong ties that call upon them, now as well as formerly, to form a single nationality.

Nicaragua and El Salvador cannot consider themselves as two international entities bound by mere ties of courtesy. No; the two countries together formed part of the Captaincy-General of Guatemala subject to the dominion of the Spanish monarchy; later they burst forth into a life of freedom by the same solemn declaration of independence, and remained constituent parts of the Federal Republic of the Center of America until the year 1839. Since that date the two countries have taken part in various attempts at union that culminated, in the year 1898, in the appearance of the Greater Republic of Central America.

Their political constitutions have always declared that the two countries are disintegrated parts of the Central American Republic and that they recognize the necessity of a return to the union. These repeated declarations cannot be interpreted as void of meaning, for they are a part of the fundamental codes, the most important organic acts of two peoples, laying down the basic principles for the regulation of their lives and their tendencies.

On the other hand, it is not true that the Republic of Nicaragua, in its present constitution, adopted in 1912, failed to declare — and merely as a simple aspiration — the longing of the Nicaraguan people

to see reborn the Republic of Central America. Article II of that political constitution reads as follows:

Sovereignty is one [at once] inalienable and imprescriptible and resides essentially in the people, from whom the functionaries appointed by the Constitution and laws derive their powers. Consequently, no pacts or treaties may be entered into that are in opposition to the independence and integrity of the nation or that in any way affect its sovereignty, save those that tend toward the union of one or more of the Republics of Central America.

The Court is of opinion that the above proviso constitutes the expression of the national sentiment of Nicaragua in regard to the reconstruction of the old Central American State, because for that purpose only does its sovereign will consent to acts that affect the sovereignty or integrity of the nation.

It should, therefore, be understood that every dismemberment of territory, even though in the form of a lease, violates primordial interests of El Salvador as a Central American people, above all in respect of those places in which both States have interests in common and in solidarity.

CHAPTER V

VIOLATION OF ARTICLE II AND IX OF THE GENERAL TREATY OF PEACE AND AMITY

Whereas: The Court is of opinion that Article II of the Bryan-Chamorro Treaty is violative of Articles II and IX of the Treaty of Peace and Amity entered into by the Republics of Central America. The text of Article II of the last-named treaty reads as follows:

Desiring to secure in the Republics of Central America the benefits which are derived from the maintenance of their institutions, and to contribute at the same time in strengthening their stability and the prestige with which they ought to be surrounded, it is declared that *every disposition or measure that may tend to alter the constitutional organization in any of them is to be deemed a MENACE to the peace of said Republics.*"

The high parties litigant do not agree respecting the interpretation and scope of that international pact. The high party complainant maintains that by the text of that provision the five States agree not to alter in any form their constitutional order, because such alteration would be considered by all and each of them as a menace to their security and derogatory to that prestige that should surround the institu-

tion under which we are governed. The high party defendant, on the contrary, gives it as its opinion that the provision has no other legal purpose than to inhibit such action on the part of a Central American State as would redound to the prejudice of the constitutional order in any of the others. The measures thus prohibited are not those dictated by a country for the conduct of its proper life; they are such as might be adopted by another State for the alteration of the constitutional order.

Pervading the letter and spirit of Article II, now under examination, is a thought of capital importance: the agreement to maintain peace in Central America, and, as a means for the realization of that main purpose, the observance of the institutions and the obligation to preserve unalterably the constitutional order. All agencies, measures, elements or circumstances that alter that constitutional order, whether arising from without or within that State whose constitutional order might thereby be disturbed, must, therefore, be logically, considered as prohibited. And in that sense it would be purposeless to discuss what is understood by constitutional order: whether it be the maintenance of the democratic representative system of government in its well-known division of power, or the harmonious functioning of those organisms; or whether that order, in the language of the treaty, comprises also the phenomena of the relation between the signatory States, since it is unquestionable that under the principles of public law there is an alteration of constitutional order — in perhaps its most serious and transcendental form — when a state supplants, in all or part of the national territory, its own sovereignty by that of a foreign country and thereby, from that moment, overthrows its own laws in order that those of the concessionary State may govern therein.

In the sphere of principles the exercise of the public *auctoritas*, of *imperium* or of *jurisdictio*, on the part of the foreign sovereignty fundamentally alters the normal life of the nation, because national territory and its exclusive possession are indispensable elements of sovereignty.

The Government of Nicaragua, in infringing a constitutional standard — such as that which requires the maintenance of territorial integrity — has consummated an act that menaces the Republic of El Salvador, which is interested and obligated by the Treaties of Washington to maintain the prestige of the public institutions of Central America.

The application of those principles to the present discussion shows clearly that the five Central American States, by operation of the system of law created in virtue of the treaties concluded at Washington in 1907, solemnly agreed to save harmless their sovereign power and their autonomous systems, within the rule of strict legal relation which they are in duty bound to adhere to among themselves — this for the evident purpose of preserving those inalienable privileges for the work of political unity to which they aspire and which is so insistently safeguarded in those memorable pacts.

Article II of the Bryan-Chamorro Treaty also infringes Article IX of the General Treaty of Peace and Amity in force among the Republics of Central America because it provides that "the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States."

The United States could, therefore, concede to the vessels of Nicaragua, in the waters that remained under her sovereignty, all the exemptions, immunities and privileges that they might please to bestow upon such vessels; but Nicaragua could not ask that similar concessions be extended to the vessels of the other Central American countries. The United States have the power to disrupt the equality of treatment accorded to all the vessels of the signatory countries by Article IX of the Treaty of Peace and Amity; and Nicaragua, by the voluntary act of her Government, has incapacitated herself from complying with what was agreed to. It is true that nothing prevents that Republic from bestowing any rights or imposing any charges upon its own vessels and the vessels of the other signatory countries; but this on a footing of perfect equality, and in such solemn manner that no difference whatsoever could be made between a Nicaraguan vessel and any other Central American vessel. Nicaragua, in transferring her adjacent seas to the ownership and sovereignty of a foreign nation, not only as to her coastal mainland on the Gulf of Fonseca, but as to the so-called Corn Islands in the Atlantic, has surrendered all power to enact laws and regulations for her own vessels, and, therefore, to control, with equality in laws and regulations, the vessels of the other Central American States.

The Court has no hesitation in affirming that the Bryan-Chamorro Treaty, which contains no limitation or reserve in that respect, but which rather avoids expressing the fact that in the leased territory

and waters the laws and sovereign authority of the United States alone will govern, places in jeopardy what the Republic of El Salvador acquired in Article IX of the General Treaty of Peace and Amity, since it leaves them dependent upon a foreign sovereignty that is under no obligation to recognize or respect them.

CHAPTER VI

CONCERNING THE INTERVENTION AND CONSENT OF EL SALVADOR AND THE OBLIGATION OF THE NICARAGUAN GOVERNMENT TO REESTABLISH AND MAINTAIN THE STATUS QUO ANTE

Whereas: The Government of Nicaragua, being bound by solemn agreements to the Government of El Salvador to maintain unchanged the constitutional order and the full exercise of the perfect rights that have been mutually recognized in the General Treaty of Peace and Amity, the ceding Government could not, without the authorization and consent of El Salvador grant a naval base in the Gulf of Fonseca, impressed as it is with common ownership pertaining to three co-sovereigns, since none of them could properly dispose of its rights independently without affecting those of the other sovereigns, in view of the status of community in which the Gulf has been and is held, thanks to the universal principle handed down by Roman law and faithfully observed in modern law, that coparceners may not perform any act disposing of a thing possessed in common except jointly or with the consent of all.

The absence of that *joint will* is equivalent to the omission of an *empowering formality*, since the Government of Nicaragua lacks the legal capacity to alter by itself the *status jure* existing in the Gulf of Fonseca; and hence is born the right of the high party complainant to hold that the Bryan-Chamorro Treaty violates its rights.

Whereas: As a logical consequence of the violation of rights claimed by the Government of El Salvador and recognized by this tribunal, the Government of Nicaragua is impressed with the obligation to take all possible means sanctioned by international law to reestablish and maintain the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro Treaty.

It is clear that under the principles of international law and the previous stipulations agreed to in the Treaties of Washington, the high party defendant was without power to enter into a new treaty

that undermined in any degree the moral and legal structure of those principles and stipulations. (See the doctrines laid down by Fiore, Olivart and Pradier-Fodéré.) Hence the obligation imposed on the Government of Nicaragua to reestablish and maintain, by all means possible, the legal status respecting the matters here in controversy that existed with El Salvador prior to the 5th of August, 1914, on which date that memorable treaty was concluded.

CHAPTER VII

CONCERNING PRAYERS III AND IV OF THE ORIGINAL COMPLAINT

Whereas: The Court is without competence to declare the Bryan-Chamorro Treaty to be null and void, as in effect, the high party complainant requests it to do when it prays that the Government of Nicaragua be enjoined "to abstain from fulfilling the said Bryan-Chamorro Treaty." On this point the Court refrains from pronouncing decision, because, as it has already declared, its jurisdictional power extends only to establishing the legal relations among the high parties litigant and to issuing orders affecting them, and them exclusively, as sovereign entities subject to its judicial power. To declare absolutely the nullity of the Bryan-Chamorro Treaty, or to grant the lesser prayer for the injunction of *abstention*, would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court. The Court, therefore, in this regard, adheres to the doctrine laid down in the former decision — of September 3, 1916, in the case of *Costa Rica v. Nicaragua* (Reports of the Central American Court of Justice, Vol. V, Nos. 14 to 16).¹

Nor does the Court grant herein any other form of relief, as prayed by the high party complainant in the fourth prayer of its original complaint, because such relief has not been prayed for in concrete form, and was not made the subject of argument in the case during the trial.

WHEREFORE:

The Central American Court of Justice, in the name of the Republics of Central America, and in the exercise of the jurisdiction conferred upon it by the Convention of 1907, concluded at Washington, to which it owes its existence; also in conformity with the provisions of Articles

¹ Printed in this JOURNAL for January, 1917 (Vol. 11), p. 181.

I, XIII, XXI, XXII, XXIV and XXV of said Convention, and with the provisions of Articles 6, 38, 43, 56, 76 and 81 of the Ordinance of Procedure of this Court; and, furthermore, in accordance with the conclusions voted at the session of the 2d instance, hereby, and by a majority vote — which is made necessary because of the dissent of the judge for Nicaragua, whose vote was, therefore, recorded separately — renders the following —

DECISION:

First. That the Court is competent to take cognizance of, and decide the present action brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua;

Second. That the exceptions interposed by the high party defendant be, and they are hereby, denied;

Third. That, by the concession of a naval base in the Gulf of Fonseca, the Bryan-Chamorro Treaty of August fifth, nineteen hundred and fourteen, *menaces the national security* of El Salvador and *violates* her rights of coöwnership in the said Gulf, in the manner and within the limitations, set forth in the Act Recording the Vote of the Court and in Chapter II of the Second Part of this Opinion;

Fourth. That the said treaty *violates* Articles II and IX of the Treaty of Peace and Amity, concluded by the Central American States at Washington on the twentieth of December, nineteen hundred and seven;

Fifth. That the Government of Nicaragua *is under the obligation* — availing itself of all possible means provided by international law — to reëstablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant Republics in so far as relates to the matters considered in this section;

Sixth. That the Court refrains from rendering any decision in response to the third prayer of the original complaint; and

Seventh. That, respecting the fourth prayer of the original complaint, the Court also refrains from rendering decision.

Let the foregoing be communicated to the high parties litigant and to the other Governments of Central America.

ANGEL M. BOCANEGRA.

DANIEL GUTIÉRREZ N. (NAVAS).

M. CASTRO R. (RAMÍREZ).

NICOLÁS OREAMUNO.

SATURNINO MEDAL.

MANUEL ECHEVERRÍA, *Secretary.*

BOOK REVIEWS

Contrebande de Guerre Blocus Droit de Visite. By Yves Favraud. Paris: Georges Monge. 1916. pp. 390.

This is a volume of 390 pages of a somewhat unusual construction. There is no preface and, at the beginning, no *Table de Matières*. There is such a table at the end of the volume, but a very brief one covering but three pages. There is no index whatever, and without a full index a work of learning and reference is difficult of use. Its contents, however valuable, are almost inaccessible.

One page is given to *errata* on which 36 errors are noted and corrected. The brief introduction of three and a half pages announces that the author will here expose impartially the methods followed by each belligerent without complaint against the Germans or pleading in favor of the Allies. However, without violence or abuse to the Central Powers, the cause of the Entente is, as is natural, habitually supported.

The first part, covering eighty-six pages, is historical in character, giving a chapter each to contraband of war, right of visit and blockade, and the state of the question. This is brilliantly and positively written, like an informing lecture, with few references or citations. It gives, on the whole, an interesting, brief and systematic account of the origin, progress and present state of the international rules governing the topics treated.

The second part of the work deals with the application of principles in the war, 1914-1916, to contraband of war and blockade. This part is arranged under two titles. The first of these deals with the extension of the notion of contraband, the "lists of contraband," then "the results of the elaboration of these lists"; and, lastly, under the caption *Les Neutres et le Commerce* the author especially discusses American protests against the measures of the Allies as to prizes. A chapter of twenty-nine pages discusses the history and principles of blockade, and the novel practices of declaration of zones of war and blockade by submarines.

The third and last part of the text deals with the sanction of contraband and of blockade, and the right of visit and seizure. The first chapter of this part treats of the exercise of this right by the Allies. The second of submarine war and of the American notes and the academic contest, the third of the jurisprudence of prize courts. Eight and a half pages are devoted to Conclusions. Seventy-three pages are given to documents, being selections from the ratifications and reservations of the Second Hague Conference, the German *Ordonnance des Prises* of 1909, from *Reichsgesetzblatt*, Berlin, 1914, the Italian instructions as to prizes, and then follows a bibliography of eight pages.

In his conclusion, Doctor Favraud denounces the German doctrine that military necessity makes law as an insult to the law and as absolutely and desperately barbarous. He says the time for small reforms is past. It is necessary to choose between the old statute, the creator of the actual facts, and a new statute totally different, which will place the nations beyond the possibility of seeing themselves renew for a long time the sorrows of the modern war. He closes his conclusion with this characteristic passage:

Il faut, pour que la Patrie soit plus rayonnante et plus heureuse, pour que la paix soit plus profonde et durable, que les relations mondiales soient basées désormais, non plus sur le Droit de la Force mais sur la Force du Droit.

CHARLES NOBLE GREGORY.

L'Italie et la Guerre actuelle. Association nationale des Professeurs d'Université d'Italie, Florence. 1916. pp. viii, 285.

This is a work prepared for the benefit of the Red Cross by the National Association of University Professors of Italy, to put in evidence the "just and noble reasons" for Italian entrance into the war. The French edition enlarged from the Italian has two new chapters.

The opening chapter is upon "The moral reasons of our war." Professor Del Vecchio here endeavors to show that although Italy was wholly justified in entering the war on grounds of legality and national policy, there is also a moral justification. Emphasizing the embodiment of national entities in political unities, he follows Romagnosi. He favors the "ethnocratie," by which Romagnosi means a state including all persons of a common *nationality* and within *natural* boundaries. The Italian aim, he justifies on philosophical grounds, quoting authorities. In fighting to attain this end for herself Italy really has

a wider end in view, that is the principle of national autonomy, as opposed to the German principle of lust for dominion based on a distorted philosophy. There is an attempt to prove that justice and not force is the aim of Italy. "It is precisely these principles and these ethical values—the autonomy of individuals and of nations, the primacy of right over force, the fidelity to sworn faith—which alone can render life worth while for men in general." (p. 19.)

In like eloquent terms Professor Fedozzi, of the International Law Department at Genoa, describes "The national ideal and the duty of Italy." He recognizes accomplishment of the national ideal as the primary Italian aim, and expounds the Italian doctrine, affirming nationality as a principle of international law. According to this school the *nation* not the *state* is the true unit which enjoys rights, and is under obligations at international law. "According to the Italian school, of which the initiator is Mancini, nationality is a resultant of natural and historical elements." (p. 30). Professor Fedozzi traces the history of this theory in Italy and shows that the principle of nationality is not entirely theoretical in Italy, for since the Piedmontese law of March 17, 1848, in other provinces as well, inhabitants of the unredeemed provinces have been accorded political privileges, now almost equal to those of Italians proper. (p. 37).

Professor Bonfante's chapter on "The political reasons for our war" outlines the course of recent Italian policies. Although in the main practical, Professor Bonfante also launches into the realms of political idealism in closing with the prophecy that as the city state merged into the national state, so the national state will in time merge into the world state, and Italian policy has really made for the consummation of this high ideal.

In his article on "The denunciation of the triple alliance" Professor Fedozzi becomes more technical and from relevant sections of the Triple Alliance Treaty, as first published in the German White Book, argues that the agreement was intended to apply only to a defensive war, and that the war of Austria, following her own aggressive action, not only fell short of the *casus fœderis* mentioned in Article 3, but also of the situation in which Italy would have been obliged to maintain "benevolent neutrality" as provided in Article 4. Furthermore, he contends that Austrian action was a violation of the treaty and gave ample justification for the Italian denunciation and reassumption of complete freedom of action.

Professors Arias and Errera deal respectively with the economic and geographic aspects of Italian nationality. They show that Italy is both a natural unity and an economic unity. The Italian school does not limit nationality to the narrow sense of the character of the people, but considers natural boundaries and economic areas as implied in the term.

An historical chapter by Professor Leicht deals with the struggle since the middle ages between Italy and Austria over the "unredeemed territory." The actual conditions in this region with reference to the present character of the people is described by Professor Bianchi. The effect of suppression of the Italian language, the frequency of pro-Italian demonstrations in the Trentino, the Austrian repressive measures, even amounting to censorship of mails going into Italy, are pictured.

Professors Solmi and Revelli also treat historical and political relations of Italy in the Mediterranean and the Near East. They regard as inevitable the Italian conflicts with Turkey in 1911 and again in 1915. The recent increasing subserviency of Turkey to Pan-Germanism was regarded as a menace to Italian commercial interests in the Eastern Mediterranean, a region whose shores have been extensively colonized by Italians.

The closing chapter by Professor Albini attempts to interpret Italian character and Italy's place in world civilization, contrasting Italian and Germanic art and ideals, dreading the regimentation which Germany might impose on the world, and which military efficiency makes necessary. Yet he hopes there is a brighter side, and that the war may lead to a new idealism and artistic regeneration, especially in Italy.

While, as might be expected, the book has the usual faults of special pleading, it undoubtedly gives a good clue to the point of view of educated Italians, and is an excellent summary of different phases of modern Italian political thought, and its Italian idealism and tendency to subordinate the practical to the philosophical is a hopeful and striking contrast to many recent volumes.

GEORGE GRAFTON WILSON.

Des Requisitions en Matière de Droit International Public. By Georges Ferrand. 2d ed., Paris: A. Pedone. 1917. pp. xx, 490.

This is a revised and enlarged edition of a doctor's thesis originally published in 1892. It contains prefaces by Professor Renault and the

Intendant General Thoumazou, a bibliography of the literature relating to requisitions and contributions, and a number of "annexes" containing the texts of various official and other documents. Professor Renault, in his preface, after adverting to German practice in respect to the levying of contributions and requisitions contrary to the international conventions and established usages, expresses the hope that the time will come when belligerents will respect the rules of international law in a manner to reconcile military exigencies with consideration of justice.

M. Ferrand's treatise is probably the most elaborate study of the subject of contributions and requisitions that has been made. It is almost encyclopædic in its scope and character, containing as it does a vast amount of information in regard to the practice in the past, the views enunciated at the Brussels and Hague Conferences and the conclusions reached, the discussions in the Institute of International Law, the rules laid down in the military manuals of the more important states, and the opinions of the jurists, text writers, and military authorities.

His analyses of the *proces verbaux* of the commissions of the Hague Conferences which considered the subject are especially full and detailed. He considers, in turn, the general principles governing the law and practice, the various kinds of requisitions, the objects that may be requisitioned, the purposes for which supplies may be taken and contributions levied, the procedure to be followed, the duty to furnish receipts, the question of payment, the duty of the state to indemnify its nationals for supplies taken without payment, the rights of neutral persons and property, sanctions for failure to comply with the demands of the requisitioning belligerent, etc. He readily admits that the right of a belligerent to requisition supplies and to levy pecuniary contributions is unanimously recognized, although the exercise of the right is subject to certain well-established limitations which he examines in turn. Concerning the requisition of personal services which the Germans have resorted to on so large a scale during the present war, M. Ferrand very properly contends that they have exceeded their lawful rights in compelling the enemy to dig trenches, work in munition and barbed wire factories, stone quarries, to construct roads for strategic purposes, and to operate railway trains for the transportation of troops and military supplies.

Regarding the much controverted question of the right to requisi-

tion guides from the enemy population, M. Ferrand concludes, from a detailed study of the views expressed at the Hague Conferences and from an examination of the text of the convention, that it was the intention of the convention to forbid requisitions of this kind. This view is reinforced by the interpretation of the great majority of text writers and the conclusions of the Institute of International Law, to say nothing of the considerations of justice and public policy. He recognizes the right of a belligerent to take possession of the railways and use them for military or other purposes in accordance with the well-established rules of usufruct; but he, very properly it would seem, denies the right of a belligerent to tear up the tracks and transport the rails, cross ties, and rolling stock to his own country, as the Germans recently did in the case of certain Belgian railways which were torn up and carried away for the construction of new lines in Poland. This is not permissible, among other reasons, because the duty imposed by international law on the occupying belligerent to restore the railway, at the conclusion of peace, is practically impossible of fulfillment. He reaches the same conclusion regarding the German practice of requisitioning Belgian horses and transporting them to Germany, not for the "needs of the army" but for the use of German farmers and stock raisers in their own country; and for the same reason he condemns the German practice of seizing and removing to Germany the machinery and equipment of Belgian factories and manufacturing establishments for use by their own manufacturers at home. The theory laid down by Von Moltke in his letter to Bluntschli and by the *Kriegsbrauch im Landkriege* that a belligerent is not bound to take into consideration the resources of the country but may requisition everything that the army needs, M. Ferrand very justly attacks as not only harsh but contrary to the plain language of the Hague Convention.

While M. Ferrand's work does not purport to deal with requisitions at municipal law, he nevertheless devotes a chapter to the consideration of the right of the inhabitants to reimbursement by their own government for supplies taken by the enemy and for which no payment has been made, and he gives a resumé of French law and practice in respect to this matter, both during the War of 1870-71 and during the present war.

One chapter of the present work is devoted to a review of German policy in respect to the levying of contributions and requisitions (but not collective fines) during the present war, but in view of the large

scale on which the Germans have resorted to this method of raising money and supplies, and in view of the protests which it has provoked on the ground of illegality, it seems to the reviewer that the subject is inadequately treated. In reality the chapter consists mainly of quotations from the reports of the Belgian and French official commissions of inquiry and contains little information beyond what is found in those reports. The facts are, of course, difficult to obtain at present, but if they are ever available, as it is to be hoped they will be, they will afford materials for a valuable chapter in the history of international law which is yet to be written.

JAMES W. GARNER.

Belgium's Case; A Juridical Enquiry. By Ch. de Visscher. Translated from the French by E. F. Jourdain, with a preface by J. Van Den Heuvel, Minister of State, London, New York and Toronto: Hodder and Stoughton. 1916. pp. xxiv, 163.

On August 4, 1914, the German Chancellor announced to the Reichstag, to quote the author, that

Our troops have occupied Luxembourg and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of international law. . . . Necessity knows no law. We were compelled to override the just protest of the Luxembourg and Belgian Governments. This wrong — I speak frankly — we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened as we are, and is fighting for his highest good, can only have one thought — how he is to hack his way through.

This statement coming from such a source at such a time attained at once a significance that all the neutral world was quick to perceive. It rendered difficult the task of German apologists who sought to convince neutral opinion that the invasion of Belgium was not without justification. A number of such individuals assumed that task, however, and made vigorous, earnest, and elaborate effort to accomplish it. Their labor suggests the picture drawn by Carlyle, in his *Essay on Burns*, of a dwarf vainly struggling to hew down mountains with a pickax. Lest, however, some uninformed or prejudiced individual, however pure in heart, might be unbalanced by the torrent of pamphlets and articles from the pens of men of reputed learning, Professor Charles de Visscher, of the University of Ghent, has undertaken to put the case of Belgium in its true light.

He calls his work a *Juridical Enquiry*. He adverts to the basis of

Belgian neutrality and its characteristics, calling attention to the origin and character of the permanent neutrality of Belgium, and the force of international agreements purporting to protect the rights of neutral states. He deals carefully with the German plea of necessity and with the distinction drawn between the right of self-defense (*notwehr*) and the alleged right which a so-called state of necessity may induce (*notrecht*). He denies the existence of evidence in support of the allegation that the conduct of France excused the German occupation of Belgium on grounds of self-defense.

The most interesting portion of the book is the treatment of the German plea of necessity as expressed by the term *notrecht*, and formally relied upon in German diplomatic intercourse. This plea asserts that a state has a right for strategic reasons to invade the territory of a neutral and blameless state, if by so doing a decisive blow may be struck by the most easy and rapid way against the enemy. It is essentially opposed to law. In fact, as Professor Kohler of Berlin (as quoted by the author) has declared, "where the ordinary rules of juridical organization suggest no way of resolving the problem, *law must bow before fact* and side with the conqueror: *factum valet*." In response, Professor de Visscher takes the stand that there is no place for *notrecht* in international law, apart from the special cases in which it is implied in, and co-extensive with, the exercise of self-defense; and his American readers will not be disposed to disagree with him.

No small service has been rendered by this author in marshaling the views of German writers, and in revealing their philosophy. It is important that intelligent opinion in the United States should be enlightened respecting the place which the principles of international obligations occupy in the minds of Teutonic authors of academic distinction.

The author treats at length of the treaties of 1831 and 1839 in relation to Belgian neutralization, and discusses skillfully the subject of their interpretation in the light of German argument. The application of the Fifth Hague Convention is touched upon. Vigorous denial is made of the charge that Belgium violated any obligations of its permanent neutralization, and the German contentions that it did so are examined and weighed.

The author concludes that Germany has been ill-served by those to whom she committed her cause, and that "the propaganda of her jurists, neither discreet nor dexterous in treatment, has alienated from

her the sympathy which the brutal policy of her government had not altogether destroyed." The soundness of this statement will not be doubted in the United States.

Mr. Jourdain, the translator, has so accomplished his task as to cause the American reader to forget that the original text was written in a foreign tongue.

An index and a bibliography are appended.

CHARLES CHENEY HYDE.

The Balkan League. By I. E. Gueshoff. Translated by Constantin C. Mincoff. London: John Murray. 1915.

This book, by the ex-Prime Minister of Bulgaria and one of the creators of the Balkan Alliance, is one of the best bits of inside information we have as yet at our disposal concerning Balkan affairs during the years 1912 and 1913. And yet it is in many ways a teasing and even a disappointing work. Valuable as is the information it gives, it leaves much more untouched. For this, perhaps, the character of the book is to some extent responsible. It is not, despite its title, really a history of the Balkan Alliance: it is primarily written to defend the policy of Bulgaria in general and that of the Gueshoff Ministry in particular. Thus it centralizes the action far too much at Sofia and gives far too little weight and sometimes insufficient credit to the motives of Bulgaria's allies during the period. Again, its controversial nature explains the omission of certain facts which might tell against the Bulgarian cause. Actual misstatements do not appear to occur. A cursory comparison of the Russian correspondence as given by M. Gueshoff and as given by "Balkanicus" in his statement of the Servian cause shows a substantial identity. And yet such omissions as that of the letter of M. Sazonof to the Russian Minister at Sofia of May 3/15, 1913, instructing the latter to advise Bulgaria to yield and defending the Servian demand for a revision of the treaty, leave a bad impression. Narrow and partisan though it may be, it is doubtful, however, if it will be possible to pick in it the flaws which the Carnegie Commission found in the account of "Balkanicus." So far as it goes, the account seems to represent the truth, so far as it was known to M. Gueshoff.

Roughly speaking, the book may be divided into two parts, the first part giving the course of events from the first negotiations for the Balkan Alliance up to the outbreak of the first Balkan War, the

second carrying the account to the outbreak of the war between the Balkan Allies. The first half is of the greatest value, presenting many new facts and giving documents either new or else known hitherto only in summaries. The second half is, relatively speaking, almost worthless. Few, if any, new facts are given, and the documents have all been previously published in one form or another. It is a matter for regret that M. Gueshoff did not reprint more of the facts given and documents cited in his Bulgarian book *Criminal Madness* for the benefit of English readers. But whether M. Gueshoff regretted the tone of hostility to the King of Bulgaria which marked this book, or because he felt the republication inadvisable for other reasons, he contents himself with summarizing this earlier work in a note and merely reprints from it his letter of resignation.

M. Gueshoff is a native of Eastern Roumelia, educated in English schools and a graduate of Robert College, who has had a long and honorable career as Bulgarian representative at various European courts. He is leader of the Nationalist party, a group with strong pro-Russian and mildly clerical leanings. Unfortunately for his future policy, he came into power in May, 1911, at the head of a coalition cabinet, the other wing being represented by the National Liberals under the leadership of Dr. Daneff, whose aims, as the sequel shows, were not in agreement with his own. The result was a duality in Bulgarian policy which had fatal results.

The limitations of M. Gueshoff's book appear at the very beginning of his account when he deals with the formation of the Balkan Alliance. He throws Bulgarian policy too much into the foreground and tends to leave the impression that the real focus of the alliance was at Sofia, whereas there seem to have been at least three foci: Belgrade, Sofia and Athens; for the Balkan Alliance was no new project. Without reverting to the scheme of Tricoupis, it would appear that in 1909 and 1910 Servia approached Bulgaria, while M. Venizelos seems to have done the same in 1910. Indeed, the first act of M. Gueshoff seems to have been to break off the *pourparlers* with Greece, and when they were renewed by M. Venizelos the Bulgarian Prime Minister returned no reply. He himself tells us that he spent his first months in office in an abortive attempt to reach a *modus vivendi* with Turkey. The will to the Balkan Alliance was present in Belgrade and Athens, but Sofia held back.

The reasons for this seem to have been two in number. In the

first place both Greece and Servia advanced claims in Macedonia as a price of alliance which Bulgaria was unprepared to admit. The second reason seems to be found in the pacific, almost pro-Turkish policy pursued by Russia during this period under the influence of M. Tcharikoff. While Russia was pacific, the Russophile statesmen at Sofia perforce followed suit. But circumstances were making this policy more and more impossible. News of attempted Ottomanization of Macedonia, of real or alleged massacres, fanned public opinion in Sofia to such a blaze that some action was necessary. And so the Servian negotiations were taken up again.

The course of these negotiations are fully described and throw much light, not only on the motives of Bulgaria, but also on those of Russia. We get less information as to the motives of Servia. With them the motive seems to have been fear of the advance of the Albanian rebels into Old Servia, an advance which seemed to foreshadow the breakup of the Turkish Empire and the formation of a Greater Albania, possibly under the protection of Austria and Italy. Such a solution would have been ruinous to Servia and had to be coped with at all costs. But Servia did not intend to ally to Bulgaria without any gain to herself. M. Gueshoff saw that concessions were necessary, and he was prepared to make them. Whether the line of demarcation drawn up really represented the division between Servians and Bulgarians in Macedonia is a question on which opinions still differ; at least it may be said that it had good learned opinion behind it — that of M. Tsvits, the geographer. But this division of Macedonia did not represent the real Bulgarian desire; they openly pressed for autonomy for all of Macedonia. The report of the Carnegie Commission seems to represent this as a concession to Servia, but even a cursory reading of M. Gueshoff's account would appear to dispel this idea. For it was imposed on the unwilling Servians by the threat — more or less veiled — to break off all negotiations, and it was never accepted at all by the Greeks. It was evidently the solution preferred at Sofia.

The reasons given by M. Gueshoff for this view are that such a solution would avoid any complications from "the touchiness of our neighbors." What is meant by this it is difficult to say, but probably Roumania is meant. She had a long-standing claim to further extensions in the Dobruja at the expense of Bulgaria, and any direct gains by the latter would give her the right to demand compensations. But there is a possibility that Bulgaria had an even more Machiavellian

reason. An autonomous Macedonia, the majority of whose inhabitants were Bulgarian in sympathy, would tend to gravitate toward Sofia, and might, in time, become a second Eastern Roumelia. Whether the Servians felt this fear it is hard to say, but it seems evident that they adopted the Bulgarian formula under pressure and with the intention of dropping it if possible.

Another phase of the negotiations with Servia which evidently caused no small trouble at Sofia was the relations between their prospective ally and Austria; for Servian policy was a double one, one glance directed at Macedonia the other toward Vienna. No alliance was possible which did not guarantee Belgrade against an Austrian attack, and this fact seems to have been recognized from the start at Sofia. But it was no easy task to win over Ferdinand to such a development of the new policy. The arguments of General Fitcheff and the remembrance of an Austro-Roumanian agreement directed against Bulgaria signed in 1900 brought him to agree. But it is doubtful if he or many others in Sofia had any more real intention of carrying out this portion of the treaty than Servia had of allowing autonomy in Macedonia to become a possibility. The test came in the question of an independent Albania as raised by Austria in November, 1912. M. Gueshoff declares that he told Belgrade he would do all possible to support them, and there seems no reason to believe he was not sincere. But, if the official *Pester Lloyd* is to be trusted, such were not the views of his agent, Dr. Daneff, who told Von Berchtold at this time that Bulgaria had no possible objection to an independent Albania and the exclusion of Servia from the sea. The explanation of this contradiction seems to have been that Daneff, now that the Greeks and Servians were in possession of the coveted Macedonia, felt that exclusive reliance of M. Gueshoff on Russia as a means to achieve the Bulgarian claims was dangerous, and that Austria would be a good second string to Bulgaria's bow and should, therefore, not be alienated. And in this he seems to have been supported by the King.

Most valuable is the account given by M. Gueshoff of the mission of Daneff to Russia in the spring of 1912 and of the state of Russian opinion at the time. It shows clearly that while the Czar and Sazonof rejoiced in the Balkan agreement, they were by no means in favor of a Balkan war against Turkey. Indeed they refused to negotiate a military convention with Bulgaria lest it should arouse a militaristic spirit in Sofia. The account seems to prove that all the statements, so com-

mon in German and Austrian newspapers later in 1912 and in 1913, that Russia brought about the Balkan war, are unfounded. It seems clear from M. Gueshoff's account that the causes of the war can be found, and found alone, in Turkish misgovernment in Macedonia, and that outside intrigues played little or no part.

The break-up of the Balkan Alliance is scantily treated in M. Gueshoff's book and it is, perhaps, unnecessary to fill up the gaps. His argument follows two lines: first, that Servia's demands for a revision of the treaty were unjustified, and second that Russia supported Bulgaria. The second argument he supports by the documents from the Russian Orange Book to which I have already referred. The situation seems to have been about as follows: when the first Balkan War broke out, Bulgaria had been forced by military exigencies to forego her real objective, Macedonia, and to throw her forces against the Turkish army in Thrace. The result was that Servia and Greece were left as *beati possidentes* in Macedonia. Servia, disappointed in Albania, demanded a revision of the treaty, which M. Gueshoff refused, because it is doubtful if he could have remained a day at the head of affairs in Sofia had he counseled further concessions. His hope lay in the fact that Russia would refuse the Servian demands for revision and would enforce the original treaty, although a large and growing faction at Sofia seems to have lost confidence in Russia, and to have been inclined to draw close to Austria-Hungary. Indeed, if Mr. Bouchier, the well-informed correspondent of the *Times* is correct, Russia promised to arbitrate in the Bulgarian sense if the attack on Tchataldja were given up; but as the spring went on Russia began to swing to the Servian side. Finally, in the instructions to the Russian minister at Sofia on May 3, 1913, Russia clearly showed that she had gone over to the Servian plan of revision. M. Gueshoff's policy lay in ruins, and his only possible escape was by resignation, which followed two weeks later. In his earlier book he attacked the King, who had dismissed him; in this account he seems to feel it unwise to do so more than by implication. Attack Russia, the real source of his troubles, he seems to have been unable to do at any time. He is a martyr to "Holy Russia."

One closes the book with the feeling that he has been witnessing a tragedy. An honest man, perhaps a bit weak, attempted the impossible and failed. At least he may claim to be guiltless of the real Bulgarian error: the attack of June 29, 1913. That was the work of the

hot-heads against whom he had fought. And the Austrian alliance, on which they relied, proved as much of a broken reed as that with Russia, in which M. Gueshoff had placed his trust. Poor Bulgaria was as unfortunate in her friends as in her enemies.

MASON W. TYLER.

El Estado y el Ejercito. A contribution to the study of a proposed law establishing compulsory military service in Cuba. By Juan Clemente Zamora y Lopez. Habana: Aurelio Miranda. 1917. pp. xii, 244.

In this thesis, presented for the degree of Doctor of Public Law in the University of Habana, the author has very logically and convincingly justified compulsory military service in a democracy like Cuba. He has treated his subject under the following heads: Chapter I, Historical resumé of the doctrines relating to the State, its origin and nature; Chapter II, Concepts of the Nation, the State and Government; its methods and ends; Chapter III, Concept of War, Pacifism; Chapter IV, Historical evolution of armies; Chapter V, Reasons of an external significance which warrant the establishment of compulsory military service in Cuba; Chapter VI, Reasons of an internal significance which warrant the establishment of compulsory military service in Cuba.

The chapter which naturally is of most interest to the student of international relations is that dealing with the "reasons of an external significance which warrant the establishment of compulsory military service in Cuba." The author does not attempt to conceal his apprehension that the United States is the greatest peril that menaces the independence of Cuba. He sees no danger in German ambitions in the Western Hemisphere. As for Great Britain, Doctor Zamora says that:

as soon as England recovers her liberty of action, we will find in her, in case the North American menace compels us to ask it, the determined support of one who will view with pleasure as many opportunities as may present themselves to recover her lost influence over Cuba (p. 191).

Furthermore, Doctor Zamora continues to observe:

Cuba has become in the eyes of the South American nations, with whom the United States is interested in maintaining cordial relations, the pledge of its good faith, and cannot, without a manifest violation of its most sacred vows and agreements, ac-

comply any aggression against us; the increasing influence of that South American alliance which we call the A B C will protect us without any doubt with as much or greater interest than England herself (p. 192).

The other main reason which would seem to the author to warrant compulsory military service in Cuba is stated by him as follows:

We have entered into an agreement with the United States to guarantee to them that Cuba shall not be a base of operations against them; we are the Belgium of America, and we shall render with our cannons and our soldiers the faithful fulfillment of an obligation, heavy without doubt, but noble and glorious, because it constitutes us, not as is falsely assumed, as wards or dependents of the great Republic of the North, but rather as its sincere friend and firm ally (p. 176).

It will be seen from these extracts that Doctor Zamora y Lopez has written in a striking and vigorous manner on a subject of great general interest. At a time when democracy is embattled and making immense sacrifices for the overthrow of Prussian militarism, it is welcome to have such a forceful defense of the principle of compulsory military service. The author has successfully proved that a free democracy can only maintain itself with safety when every citizen is trained to arms.

PHILIP MARSHALL BROWN.

Der Gedanke der Internationalen Organisation in seiner Entwicklung.

By Jacob Ter Meulen. The Hague: Martinus Nijhoff. 1917.
pp. xi, 362.

The author divides his book into three parts, the first part being The Development of the International Idea, the second, The Different Attempts of International Organizations, and the third, A Résumé. At the end of the book (pp. 365-384) there is an excellent bibliography.

A great number of books have appeared within the past decade dealing with the history of the growth of international organization due undoubtedly to the influence of the Hague Conferences. But none of them gives as sharp, succinct, and convincing an account of that growth as does the book here under consideration. In thirteen short chapters it covers the period from 1300 to 1800 and shows the changes which hurried a world, that had not a thought beyond the papal-imperial dualistic order of things, through the shocks of shattered ideals, religious and political, through the sudden rise of national aspirations and their occasional subordination to union against Turkish aspirations,

toward the strange idea that international federation might have as its aim perpetual peace rather than intermittent war.

The National State, as the author brings out clearly, was an *ils ne passerait pas* to Pope and Kaiser, and yet the new entities had to take shape and gain strength despite Pope and Kaiser, who remained both lively claimants, one to their spiritual, the other to their political domination. In the relations between Christendom and heathendom and in the propagation of the idea of 'the Just War' the Pope gained something at the expense of the Kaiser, but neither could keep pace with the doctrine of the balance of power, the idea of the *civitas maxima*, the successful federation, and the new economic theories which successively led up to an idea hitherto unknown of Peace.

The second part of the book gives excerpts from or comments upon twenty-nine different plans for international organization. The earlier projects are based either on the recovery of the Holy Land or the expulsion of the Turk from Europe, and they also have more or less clearly marked political purpose. Crucé is the first (1623) to propose an organization of more universal character including an international court, even proposing Turkey among the participants. After Crucé the projects take on somewhat more of an economic character, except that of Kant, which is almost so idealistic as to be classed among the Utopias. Sully's plan, usually called the Great Design of Henry IV, was the first to put forward the principle of the equality of the participating states or rulers', while William Penn is the first to suggest that the representation of the different states depend upon annual income.

Theoretical peace plans might naturally be supposed to cluster about a war, and the dates of the various projects proposed show that to be true. How much the plans at any given time influence the next treaty that is made cannot be determined, but that in the long run the theoretical projects have furnished the basis for the practical trials seems well established. The author is to be congratulated for having given to the world so clear and sane an account of the ideas and the results of international organization.

R. V. D. MAGOFFIN.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For List of abbreviations, see p. 655.]

- Aeronautics.* Avenir (L') de l'aviation pour les relations internationales. *Clunet*, 44:501.
- . Bombardement (Le) aérien. P. Fauchille. *R. gén. de dr. int. public* 24:56.
- Ambassadors.* Inviolability of ambassadors. *Law T.*, 142:284. Feb.
- Appam, The.* Case of the "Appam." C. D. Allin. *Minnesota L. R.* 1:1, Jan.; *Chicago Legal News*, 49:235. Feb.
- Armed neutrality.* American armed neutrality. J. M. Whelpley. *Fortnightly*, 101:705. April.
- Armed pacifism.* Armed pacifism. Sir John Macdonell. *Contemporary*, 111:290. March.
- Balkans.* Balkan diplomacy. S. R. Duggan. *Political Science Q.*, 32:36. March.
- Blockade.* Great (The) naval blockade. Sir Francis Piggott. *Nineteenth Century*, 81:281. Feb.
- Belgium.* Belgische (Der) Volkskrieg und die Haager Landkriegsordnung. Karl Strupp. *Zeitschrift für Völkerrecht*, 9:281.
- . Brand Whitlock on Belgian deportations. *Current History*, 6:543. June.
- . Neutralität (Die) Belgiens und die Festungsverträge. J. Kohler. *Zeitschrift für Völkerrecht*, 9:298.
- Carnegie Endowment for International Peace.* Carnegie Endowment for International Peace. *J. of Comp. Legislation*, 17:128. Jan.
- Chile.* De quelques difficultés entre Chili et les pays étrangers en matière de doubles nationalités. A. Alvarez. *Clunet*, 44:464.
- China.* China. Nationalité. Loi révisée sur la nationalité, promulguée par le décret présidentiel en date du 30 de décembre, 1914. Text: *Clunet*, 44:767.
- Choate, Joseph H.* Mr. Choate as ambassador. *Britannicus. N. American R.*, 205:925. June.
- Consuls.* Status of consuls in territory under military occupation. C. H. Huberich. *International Law Notes*, 2:37. March.
- Contraband.* Contraband lists and the present war. R. Howell. *Virginia L. R.*, 2:371. Feb.
- Diplomacy.* Democracy and diplomacy. Arthur Bullard. *Atlantic*, 119:491. May.
- Diplomatic Agents.* Diplomatic agents of the United States. H. M. Wriston. *J. of Comp. Legislation*, 17:131. Jan.
- . Ordinamento (L') della carriera consolare. I: consoli ed emigranti. II: consoli e diplomatici. *La vita italiana 1916*, vol. I:522, vol. II:27.
- Egypt.* Egitto (L') dal dominio ottomano al protettorato britannico. E. Catellani. *Rivista coloniale*, 11:1, 73.

- . Tutela (La) dell' emigrante dei trattati di lavoro. L. De Feo. *La vita italiana* 1916, vol. I:255.
- Enemy Subjects.** Liquidation des firmes ou maisons de commerce anglaises qui fonctionnent en Allemagne et de la saisie des biens anglais en pays occupé. An. et Trad. de E. Dreyfus. *Clunet*, 44:492.
- . Régime (Le) juridique des biens des sujets ennemis en Allemagne. Dr. Giesker-Zeller. *Clunet*, 44:385.
- . Recevabilité des sujets ennemis à ester en justice en France. G. Théry. *Clunet*, 44:480.
- Espionage.** Condamnation à mort pour espionnage d'individu à nationalité changeante. *Clunet*, 44: 586.
- . Espionnage (L') allemand en France et particulièrement à Paris devant le Parlement. *Clunet*, 44:570.
- European War.** Ambassador Gerard's difficulties on leaving Berlin. *Current History*, 6:62. April.
- . American courts and the European war. *Law Notes*, 20:182. Jan.
- . British blacklist. *Harvard L. R.*, 30:279. Jan.
- . Inexplicable (The) German idea. Philip Marshall Brown. *N. American R.*, 205:523. April.
- . Mise (La) sous séquestre des biens allemands et austro-hongrois en France appréciée par les juristes suisses. Dr. Reichel. *Clunet*, 44:489.
- . New (The) ascendancy. Belgium, Bohemia and the Ottoman Empire. *Round Table No. 26*, p. 318. March.
- Finland.** Ueber einige für die Beurteilung der finnländischen Frage bedeutsame Fragen des allgemeinen Staatsrechts. R. Erich. *Zeitschrift für internationales Recht*, 26:218.
- Flags.** Law and custom of flags. *Law Times*, 142:166, 813. Jan.
- Foreign Judgments.** Des voies par lesquelles l'exécution d'un jugement italien peut être poursuivie en France et du caractère facultatif, ou impératif des Conventions diplomatiques relatives au droit international privé. J. Valéry. *Clunet*, 44:436.
- France.** De la francisation des noms patronymiques d'origine étrangère. *Clunet*, 44:497.
- . Français (Les) en France et à l'étranger d'après le dernier recensement. P. Vergne. *Clunet*, 44:508.
- Freedom of the Seas.** Address before the Annexationist meeting on the Freedom of the Seas. Count von Reventlow. Summary: *N. Y. Times*, May 31, 1917.
- . Two conceptions of the Freedom of the Seas. Jesse S. Reeves. *American Hist. R.*, 22:535. April.
- Germany.** Allemagne (L'), les neutres et nous. Dr. Albert. *La Grande R.*, 21:106. March.
- . Assistance professionnelle des avocats-avoués allemands aux sujets ennemis. Dr. Haber. *Clunet*, 44:448.
- . Bismarck and Bethmann-Hollweg. J. Holland Rose. *N. American R.*, 205:536. April.
- . Deutsche (Das) Auslieferungsrecht in der Praxis des Reichsmilitärgerichts. W. Mettgenberg. *Zeitschrift für Völkerrecht*, 9:459.

- . German sequestrations and liquidations. *International Law Notes*, 2:20. Feb.
- . Germania contra mundum. By Fabricius. *Fortnightly*, 101:815. May.
- . Germany's peace discussion. Chancellor's address of May 15, 1917. *Current History*, 6:427. June.
- . Recent emergency legislation of Germany. *Solicitors' J.*, 61:180. Jan.
- . Report (The) of Lord Balfour of Burleigh's Committee. Earl Beauchamp. *Contemporary*, 111:545. May.
- . Staatsverträge (Die) der deutschen Bundesstaaten über die Bestrafung von Forstfreveln und ähnlichen Vorgehungen. Karl Neumeyer. *Zeitschrift für Völkerrecht*, 9:310.
- . Théories allemandes pour la légitimation juridique de la maxime "Not kennt kein Gebot." Dr. Heinshermmer. *Clunet*, 44:471.
- Great Britain*. Standesamtliche Eheschliessung eines russischen Juden mit einer deutschen Protestantin in England. Th. Niemeyer. *Zeitschrift für internationales Recht*, 26:1.
- Greece*. King Constantine's statement of the wrongs of Greece. *Current History*, 6:153. April.
- . Sufferings of neutral Greece. Adamantios Th. Polyzoides. *Current History*, 6:148. April.
- . Vergrösserte (Das) Griechenland und das Recht. G. Goulimis. *Zeitschrift für internationales Recht*, 26:290.
- Hospital Ships*. Sinking (The) of hospital ships. *Current History*, 6:442. June.
- Internationalism*. National independence and internationalism. Bertram Russell. *Atlantic*, 119:822. May.
- International law*. Ancora sugli arbitrati esteri e sulla proroga della giurisdizione italiana. G. Ottolenghi. *R. di diritto commerciale e del diritto generale delle obbligazioni* 14:925.
- . Arbitrato estero. — Incapacità processuale degli austriaci durante la guerra. F. Carnelutti. *R. di diritto commerciale e del diritto delle obbligazioni*, 14:765.
- . Controverse dans un journal suisse au sujet de l'attitude de l'Allemagne sur les questions du droit des gens et de l'arbitrage international sur deux Conférences de la Paix à La Haye en 1899 et 1907. S. E. *Clunet*, 44:513.
- . De la protection des intérêts particuliers par les neutres dans les pays belligérants respectifs, *Clunet*, 44:569.
- . De la saisie des sommes et objets mobiliers appartenant à un état étranger. Ch. Leurquin. *International Law Notes*, 2:21, 53. Feb., March.
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- . De l'emploi des prisonniers de guerre aux travaux qui précèdent la fabrication des munitions. M. Freudenthal, *Clunet*, 44:505.
- . De quelques règles de droit maritime international adoptées par la déclaration de Londres récemment dénoncée. *Clunet*, 44:531.
- . Du goût naturel de l'Allemagne pour l'arbitrage international. De Bernhardt. *Clunet*, 44:478.

- . Execution of judgment by default rendered against a foreign state. A. Nicol-Speyer. *International Law Notes*, 2:21. Feb.
- . Guerra (La) europea e la crise del diritto internazionale. A. Cavaglieri. *La vita italiana 1916*, vol. II:525.
- . German crimes in the Somme retreat. Official report summarized by Henry Cheron before the French Senate. *Current History*, 6:534. June.
- . German reprisals on prisoners. *Current History*, 6:547. June.
- . International law-contraband, continuous voyage-effect of knowledge on owners or master of ship. [The Hakan, 1916. 32 T. L. R. 639. The Maricaibo, 1916. 33 T. L. R. 48.] *Minnesota L. R.*, 1:289. March.
- . International law, blockades, violation of the Declaration of London. *Virginia L. Register N. S.*, 2:713. Jan.
- . International law. The Appam. *Central L. J.*, 84:229. March.
- . International law, neutral vessel, continuous voyage. [Maracaibo, 115 L. T. R. 639] H. D. S. U. Penna. L. R. 477. March. *Minnesota L. R.*, 1:283. March.
- . International organization. W. I. Hull. *Bookman*, 45:138. April.
- . Kriegsgefangenen (Die) und das internationale Recht. J. von Wlassics. *Zeitschrift für Völkerrecht*, 9:275.
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KATHRYN SELLERS.

THE SPECIAL DIPLOMATIC MISSION OF THE UNITED STATES TO THE PROVISIONAL GOVERNMENT OF RUSSIA.¹

ADDRESS OF ELIHU ROOT, CHAIRMAN, TO THE COUNCIL OF
MINISTERS, PETROGRAD, JUNE 15, 1917

THE mission for which I have the honor to speak is charged by the Government and the people of the United States of America with a message to the Government and the people of Russia.

The mission comes from a democratic republic. Its members are commissioned and instructed by a President who holds his high office as Chief Executive of more than one hundred million free people, by virtue of a popular election in which more than eighteen million votes were freely cast and fairly counted, pursuant to law, by universal, equal, direct and secret suffrage.

For one hundred and forty years our people have been struggling with the hard problems of self-government. With many shortcomings, many mistakes, many imperfections, we have still maintained order and respect for law, individual freedom, and national independence.

Under the security of our own laws we have grown in strength and prosperity, but we value our freedom more than wealth. We love liberty, and we cherish above all our possessions the ideals for which our fathers fought and suffered and sacrificed, that America might be free. We believe in the competence and power of democracy, and in our heart of hearts abides a faith in the coming of a better world, in which the humble and oppressed in all lands may be lifted up by freedom to a heritage of justice and equal opportunity.

The news of Russia's new-found freedom brought to America universal satisfaction and joy. From all the land sympathy and hope went out towards the new sister in the circle of democracies; and this mission is sent to express that feeling. The American democracy sends to the democracy of Russia, greeting, sympathy, friendship, brotherhood, and Godspeed.

¹ The complete addresses of Mr. Root in Russia are now in press, and will shortly be published by the Harvard University Press. — Ed.

Distant America knows little of the special conditions of Russian life, which must give form to the government and to the laws which you are about to create. As we have developed our institutions to serve the needs of our national character and life, so we assume that you will develop your institutions to serve the needs of Russian character and life. As we look across the sea we distinguish no party and no class. We see great Russia as a whole; as one mighty striving and aspiring democracy. We know the self-control, the essential kindliness, the strong common-sense, the courage and the noble idealism, of Russian character. We have faith in you all. We pray for God's blessings upon you all. We believe that you will solve your problems; that you will maintain your liberty; and that our two great nations will march side by side in the triumphant progress of democracy until the old order has everywhere passed away and the world is free.

One fearful danger threatens the liberty of both nations. The armed forces of military autocracy are at the gates of Russia and of her Allies. The triumph of German arms will mean the death of liberty in Russia. No enemy is at the gates of America, but America has come to realize that the triumph of German arms means the death of liberty in the world; that we who love liberty and would keep it must fight for it, and fight now when the free democracies of the world may be strong in union and not delay until they may be beaten down separately in succession.

So America sends another message to Russia; that we are going to fight, and have already begun to fight, for your freedom equally with our own, and we ask you to fight for our freedom equally with yours. We would make your cause ours, and our cause yours, and with common purpose and the mutual helpfulness of firm alliance, make sure the victory over our common foe.

You will recognize your own sentiments and purposes in the words of President Wilson to the American Congress, when, on the second of April last, he advised the declaration of war against Germany. He said:

We are accepting this challenge of hostile purpose because we know that in such a government (the German government), following such methods, we can never have a friend; and that in the presence of its

organized power, always lying in wait to accomplish we know not what purpose, there can be no assured security for the democratic governments of the world. We are now about to accept the gage of battle with this natural foe to liberty and shall, if necessary, spend the whole force of the nation to check and nullify its pretensions and its power. We are glad, now that we see the facts with no veil of false pretense about them, to fight thus for the ultimate peace of the world and for the liberation of its peoples, the German peoples included; for the rights of nations great and small and the privilege of men everywhere to choose their way of life and of obedience. The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty. We have no selfish ends to serve. We desire no conquest, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. We are but one of the champions of the rights of mankind. We shall be satisfied when those rights have been made as secure as the faith and the freedom of nations can make them.

And you will see the feeling toward Russia with which America has entered the great war in another clause of the same address. President Wilson further said:

Does not every American feel that assurance has been added to our hope for the future peace of the world by the wonderful and heartening things that have been happening within the last few weeks in Russia. Russia was known by those who knew it best to have been always in fact democratic at heart, in all the vital habits of her thought, in all the intimate relationships of her people that spoke their natural instinct, their habitual attitude towards life. The autocracy that crowned the summit of her political structure, long as it had stood and terrible as was the reality of its power, was not in fact Russian in origin, character, or purpose; and now it has been shaken off and the great generous Russian people has been added in all their naïve majesty and might to the forces that are fighting for freedom in the world, for justice, and for peace. Here is a fit partner for a League of Honor.

That partnership of honor in the great struggle for human freedom, the oldest of the great democracies now seeks in fraternal union with the youngest.

The practical and specific methods and possibilities of our allied coöperation, the members of the mission would be glad to discuss with the members of the Government of Russia.

REPLY OF THE MINISTER OF FOREIGN AFFAIRS

It is a great honor to me to have the pleasure of receiving this high commission which is sent by the American people and their President to freed Russia and to express the feelings of deep sympathy which the Provisional Government, representing the people of Russia, have toward your country.

The event of the great revolution which we have achieved makes allies of the oldest and the newest republics in the world. Our revolution was based on the same wonderful words which first were expressed in that memorable document in which the American people in 1776 declared their independence.

Just as the American people then declared:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

So the Russian people, which for centuries have been enslaved by a government which was not that which the feeling of the nation wished or wanted, have so declared and shaken off the fetters which bound them, and as the wind blows away the leaves in autumn so the government which has bound us for centuries has fallen and nothing is left but the free government of the people.

So the Russian people now stand before the world, conscious of their strength and astonished at the ease with which that revolution happened, and the first days of our freedom indeed brought surprise to us as well as to the rest of the world; but the day which brought the revolution was not only a day which brought freedom, for it brought us face to face with two enormous problems which now stand before the Russian people, and these problems are the creation of a strong democratic force in the interior of Russia and a fight with the common foe without, with that foe which is fighting you as well as us and which is now the last form and last strength of autocracy; and it was with a feeling of gladness that we found you on the side of the Allies and that after our revolution there was no autocracy among those with whom we found ourselves fighting. We found with joy that in the high, lofty motives which have impelled your great republic to enter this conflict there is no strain of autocracy or spirit of conquest, and our free people shall be guided by those same high, lofty motives and principles.

And now let us stand together, for we pursue the same endeavor in the war and in the peace which is to follow. We representatives of the Russian nation who have been placed at its head to lead the Russian nation through its hardships on its way to freedom, following these principles which have always brought a nation from complete slavery into complete freedom, are confident we shall find the way which will lead us side by side, not only the Russian peoples but their allies, along that way which will bring us to future happiness.

The revolution of Russia is a moral factor which shows the will of the Russian people in its endeavor to secure liberty and justice, and these elements the Russian people show and wish to show, not only in their internal affairs which we ourselves have to lead and in which we wish to be guided by these principles, but also in our international relations and in our international policies.

This war, which was brought upon us three years ago and which the Russian revolution found when it entered the struggle of free nations, left but one door for us to enter, and by that door we have entered and we shall continue in that path. These Russian people strive to the end of militarism and to a durable peace which would exclude every violence, from whatever side it may come and all imperialistic schemes, whatever

their form may be. The Russian people have no wish of conquest or dominion and are opposed to those ideas in others, and first of all they will not allow any of those imperialistic desires which our enemy has formed, manifest or hidden, to come to good in whatever sphere he may have planned them, political, financial, or economic. This constitutes the firm will or what Russia has to guard herself against.

There is also a second great thought which was expressed by that memorable document by which the nation of the United States and its people at the day of their independence declared their desires and wishes, which says that nations should have a right to show themselves the way they wished to go and to decide for their future, and this high principle the Russian people have accepted and considered that it must guide their politics, and they consider also that all nations, however small or great, have the right to decide what their future will be and that no territory and no people can be transferred from one country to another without their consent and like things. Human beings have the right to say for themselves what they shall do and whose subjects they shall become.

I am happy to see you and happy to say that there is no idea or factor of a moral or material kind to divide us or to prevent us from being hand in hand across the Pacific. These two great peoples, the free people of Russia and the free people of America—the great people of the United States who are the oldest, strongest, and purest democracy,—hand in hand will show the way that human happiness will take in the future.

Allow me, therefore, to greet you, to welcome you in the name of my colleagues and of our government which represents our people, and to say how happy we are to see you here.

A UNIQUE INTERNATIONAL PROBLEM¹

Just previous to the outbreak of the European War there was an international conference in session at Christiania in Norway which was charged with the solution of a problem unique from an international standpoint. It arose from the extraordinary political situation of the archipelago of Spitzbergen lying about four hundred miles north of the Norwegian coast.

The conference, which was in session for several weeks and to which the United States sent delegates, as did all the Powers of Northern Europe, was unable to reach a definite agreement, so that the problem remains unsolved. Sometime, however, a solution will have to be found, although the United States may not participate in future conferences, since the American interests which were involved in 1914 have, it is reported, been transferred to Norwegian capitalists. But whether we take part or not in working out the problem, it is none the less interesting on account of its difficulties and unusual character, as will be disclosed when the facts are stated.

Prior to the beginning of the present century the islands of Spitzbergen, which are nearly 50,000 square miles in area, were merely places of resort for whalers and hunters of various nationalities. The barren shores and deep harbors, which are closed by arctic ice eight or nine months in the year, were deemed to be valueless for permanent occupation. About the year 1900, however, coal deposits in West Spitzbergen, the existence of which had been known for some time, were found to be commercially valuable, and a company with American capital was organized to exploit them. Confident of the wealth of these coal fields, a considerable investment was made, shafts were sunk, and machinery and buildings erected.

The profitable nature of the enterprise aroused the cupidity of persons belonging to nationalities other than that of the first company and,

¹ This article was prepared by Mr. Lansing before he became Secretary of State. — EDITOR-IN-CHIEF.

following the example set, they began to make claims to the coal-bearing area, asserting their intention to engage in the industry. These conflicting claims were the cause of attention being called to the political situation of the islands.

The unique feature of the situation is this: Although the islands of Spitzbergen were discovered over two centuries ago and have been frequently visited since their discovery, no nation has ever considered it worth its while to occupy them or to assert sovereignty over them. The intense cold and the long period of the year when they are ice-bound necessarily made an attempt to develop their resources extremely difficult, so that they seemed to be an undesirable possession, a probable source of expense rather than a source of profit. This was the prevailing opinion of those governments whose vessels visited occasionally those barren shores in search of furs and whales. Thus the archipelago remained unoccupied, and it became generally recognized that Spitzbergen was *terra nullius*, a "no-man's land." Doubtless in recent years more than one government would have been willing to have annexed the territory in view of its possible mineral wealth, but having so long acquiesced in the declaration that it was *terra nullius* none has had the hardihood to claim sovereignty over the archipelago.

This extraordinary political state of the islands, to which a parallel will be hard to find in modern times, would have excited little interest but for the recent discovery of the richness of the coal deposits and the presence of a mining population, which gave promise of being permanent. If this population increased and persons of different nationalities settled in the islands laying claim to lands already claimed by others, how would these people be governed and to what authority could they appeal to settle their conflicting claims and to protect them in the enjoyment of their rights? That was the problem in 1914 and is the problem still which the Powers interested will have to solve. And in view of the fact that the principle of *terra nullius* must be considered as a factor it is by no means easy of solution.

Admitting that it is necessary to establish some form of government in the archipelago, the question presented is, Upon what theory can a government be established over a territory owned by no nation? What basis is there for the exercise of sovereign rights?

The situation is one that is entirely novel. The records of history will be searched in vain for precedents. The common conception of government carries with it the idea of a state and that idea seems to be inseparable from territory and from territorial sovereignty; in fact it is almost impossible to think of a government without thinking of a territory over which it operates. Now in Spitzbergen the proposition is to establish a government which can exercise its functions within a territory over which it has no sovereign powers, and which derives no authority from territorial dominion, for none exists. Can it be done? And if so, how can it be done?

Since a similar state of affairs has never before arisen to perplex the statesmen of the world, there is no use in seeking a solution in past examples. Indeed, so unusual is the situation, that comparisons and conclusions drawn from historical experience are entirely wanting, and the problem must be solved by a consideration of the fundamental principles underlying governmental institutions. It must be determined whether the nature of sovereignty admits of the possibility of the exercise of sovereign power on land without the existence of territorial sovereignty. Such a question leads into the field of political philosophy, into an analysis of the abstract idea of sovereignty, and into a consideration of its origin, extent, and exercise.

In order to approach the subject intelligently it is necessary at the outset to lay down a few premises, which are more or less axiomatic.

First. Sovereignty is, stated in general terms, the power to do all things without accountability.

Second. Sovereignty in its exercise finds expression in the direction and limitation of human action in its relation to persons and things; and this direction and limitation may be restricted by a spacial sphere or by the particular persons, whose actions are directed and limited.

Third. Government is an exercise of sovereignty and is, therefore, dependent for its existence upon the existence of sovereignty.

Admitting the correctness of these three premises, it is manifest from the second that there are two general forms of sovereign authority, namely, the exercise of direction and limitation of human action within a defined area without regard to the persons affected, which furnishes the concept of *territorial* sovereignty (*dominium*) and the exercise of

direction and control of the actions of particular persons without regard to the place of exercise, which furnishes the concept of *political sovereignty* (*imperium*).

Can the latter type of sovereignty, which has to do with the ideas of nationality, allegiance, and kindred relations be exercised without territorial sovereignty? If so, a basis is offered on which a government could be instituted and could operate in an unpossessed territory. If the exercise of sovereignty is not absolutely dependent on a territorial sphere, then it would appear that sovereign authority might be exercised over a certain class of persons within a particular area, without regard to the right of sovereignty over the area itself. The *locus* of the person would be one of the means of particularizing him, and the other means would be that he was subject to sovereign authority by virtue of nationality or allegiance. These two conditions fulfilled, political sovereignty might exist without reference to the possession of territorial sovereignty.

It would seem to be a fact demonstrable from history that, when territorial sovereignty and political sovereignty come into conflict as to the control of human action, territorial sovereignty has been as a rule, though not always, considered to possess the superior jurisdiction, in fact political sovereignty would seem to be an adjunct predicated on the existence of territorial sovereignty. The point about it is that in spacial limitation the two types do not have to coincide.

Is it then possible to conceive of a government without a territory over which it has control? The first impression is certainly against such a conception; but remembering that sovereignty has to do with human action alone, the essential condition is a body of persons subject to a sovereign authority. Wherever such persons may be, they are under the regulation of the sovereign power, the exercise of such regulation is government, and it may be confided to any representative named by the sovereign power. Now suppose that the exercise of authority is not only restricted to certain persons but also to a particular territory, there is then a government created by a state or states delegating political sovereignty with limitations as to persons and spacial area.

Necessarily a government of this type would not have such extensive powers as one based upon territorial sovereignty within the geographical

limits in which it is empowered to operate by its creators. Control over foreigners is entirely dependent upon territorial sovereignty. Persons not owing allegiance to a state creating such a government would be bound in no way to submit to it, although they might be within the area to which its exercise is limited. So far as such persons are concerned, there would be no government existent, and they could not be rightfully compelled to regard its commands.

The institution of a government of this character, based solely upon the political *status* of persons, would seem to offer a possible solution to the puzzling situation of affairs as they now exist in Spitzbergen. The persons, subject to the administration of such a government, would be only those who are nationals of states voluntarily confiding the exercise of their political sovereignty within the insular territory to the government so instituted. A state, not delegating in terms its sovereign rights over its nationals in the islands, would not be bound legally or morally to recognize the authority of the government instituted, nor would its nationals be under obligation to submit to its mandates. If, therefore, there should not be substantial unanimity by all the Powers interested in Spitzbergen in the delegation of their political sovereignties, a government founded on this theory would be inadequate to accomplish the purposes for which it is created.

It must be clearly understood that a government of this sort over persons within territory, which all the world recognizes as *terra nullius*, would be a government of delegated powers and would be limited to those specifically granted to it by the organic act bringing it into being. It would be the common agent of the several Powers conferring upon it the authority to exercise a certain measure of their respective political sovereignties, and would have no general powers, which might be implied, beyond those delegated in terms. In underlying principle it would bear some resemblance to the Federal Government of the United States, which at its inception required the assent of every State before that State's citizens became subject to Federal control. So too in the case of the Federal Government of the United States there is lacking the right of eminent domain, that elemental right of territorial sovereignty, the right being retained by the respective States of the Union; and in

case a government for Spitzbergen was formed upon the theory, which has been considered, there would be a similar lack, due, however, to the entire absence of territorial sovereignty instead of to its possession by another. The coincidence of governmental attributes can hardly be carried further, for the Government of the United States possesses an authority over domiciled and visiting aliens within its territorial sphere of operation which the Spitzbergen government would not have, the former being clothed with a measure of territorial sovereignty which could not be given to the latter, since such sovereignty in the case of Spitzbergen is possessed by no one and, therefore, could not be delegated.

The conditions in Spitzbergen would seem to require governmental control of three general subjects, which cover in large measure every form of human action. These are:

1. Public order and safety;
2. Contractual relations;
3. The use of land.

The first two of the subjects may easily be brought within the scope of political sovereignty, as they have to do entirely with the relations of persons to one another, or to the direct acts of persons; but the third subject, the use of land, seems to be peculiarly under the operation of territorial sovereignty. In the present state of affairs the use of land in Spitzbergen seems to be the most prominent of the three, as it has been the cause of the negotiations which have taken place, and the chief subject of discussion. It is absolutely essential to an agreement between the Powers, so far as those particularly interested are concerned, that the use of land should be brought under governmental control in order to preserve existing interests and to insure the safe expenditure of capital in the further exploitation and development of the mineral resources of the islands.

In considering this subject and seeking a practical solution to the problem which it presents, it must be borne constantly in mind that all government in Spitzbergen must rest solely on the sovereign authority over persons, which a state can exercise outside as well as within its own territory. Any other theory of the basis of public control would

be destructive of the idea of *terra nullius*, which all the Powers have to the present indicated a desire to retain unimpaired.

In these circumstances a real right, in the common acceptance of the term, cannot exist in Spitzbergen. Restrictions upon the use and occupancy of land must not depend upon the government's having control over the *land* used or occupied, but upon control over the *persons* who might freely occupy and use it if not restrained in their acts. The result of control in both cases would be almost, if not quite, identical, although the exercise of control would arise from principles entirely different. The essential feature of ownership is the exclusion of all others from the use and enjoyment of the thing owned. This is equally true of personal and real property. Ownership in the case of land in Spitzbergen could not, therefore, exist. All persons cannot be excluded. Only those persons could be excluded whose governments have conferred upon the insular government the right to exclude them. Exclusive use and occupancy is lacking, and so land in Spitzbergen cannot, in the true sense, be owned.

If, however, the governments of the world should with substantial unanimity agree that their respective nationals might by direction of the government formed by them for Spitzbergen as their common agent be excluded from the occupancy and use of land unless specially privileged to do so, the effect would be similar to that resulting from ownership, although it would lack the permanency of a right based on territorial sovereignty, for it would be liable to the invasion of nationals of a Power which had not conferred any portion of its political sovereignty upon the government established. In the case of ownership, the right of exclusion is complete and is derived from exclusive control of the land; in the case of the right acquired in Spitzbergen, the right of exclusion would be incomplete and would be derived from the delegated power to control persons of certain nationalities who might otherwise enter upon the land.

The same general comment as to the need of conferring upon the international agent authority over persons by the governments to which they owe allegiance applies with equal force to the functions of government in relation to public order and safety and to contractual relations.

The primary and essential condition, therefore, for the establishment

of an effective government in Spitsbergen is manifestly unanimity of action by the interested Powers in the formation of such a common government and in the delegation of authority to it. A government created and empowered by only a few nations would be worthless. International unanimity is fundamental to any plan for the efficient control of human action in Spitsbergen. On that depends the practicability of instituting a government at all. To secure such unanimity will be no easy task; it is the obstacle which will have to be overcome in order to insure public control in the islands.

Will the Powers interested recognise the distinction between territorial and political sovereignty and the necessary limitation of governmental authority in Spitsbergen to that derived from the political type in order to preserve the doctrine of *terra nullius*? That is the first question to be answered. Will the Powers, after such recognition, come to a unanimous agreement upon the form of government and upon the powers to be delegated to it? That is the second question.

If the problem is approached in the right spirit by the parties, — in a spirit of conciliation and mutual purpose to relieve the present undesirable condition, — these two questions may be answered in the affirmative, and the inhabitants of Spitsbergen, now numbering several hundred, may become subject to law and their interests conserved. But without a clear comprehension of a sound basis for the exercise of governmental authority in the abnormal state of affairs which exists, or without an appreciation that international unanimity of action in the creation and authorization of a government is absolutely essential, there seems to be grave doubt whether the present conditions will not continue, and become more and more difficult of change as new parties enter the field as competitors for the wealth which lies beneath the rocks of those bleak and ice-bound islands.

Possibly the political situation which will arise after the Great War is ended will preclude any settlement along the lines of an international government. Possibly, in view of this, the nations of Northern Europe, now warring against one another, will prefer to abandon the principle of *terra nullius* and permit a neutral Scandinavian Power to assume territorial sovereignty over the archipelago, rather than attempt further to solve so complex a problem. But even this latter method of ending

a perplexing situation is by no means as easy as it appears in view of the adjustment of the rights of conflicting claimants.

Whatever may be the final outcome, the subject as originally presented is most absorbing to the student of political science and offers him an opportunity to test his theories of sovereignty, government, ownership, and similar abstractions, by attempting to apply them to the unusual state of affairs which has arisen in Spitzbergen as a result of American enterprise and energy, which, overcoming Arctic ice and barrenness, proved to the world the wealth of the islands which no country had before that time ever cared to claim as its possessions.

ROBERT LANSING.

THE INTERNATIONAL HIGH COMMISSION AND PAN AMERICAN COÖPERATION

IN May, 1915, there assembled at Washington, on the invitation of the President of the United States, the First Pan American Financial Conference. It was attended by delegates from eighteen American Republics, and by leaders in industry and finance in the United States. The presiding officer was the Secretary of the Treasury of the United States.

The object of the conference was to consider not only the immediate and pressing problems due to the war and confronting all the American countries, but also the larger question of closer financial and commercial relations. It was apparent, however, that many of the obstacles to the growth of such relations, such as the lack of means of transportation, divergencies in fiscal administration and customs regulations, and radical difference in the rules of commercial law, were of too complex and fundamental character to be overcome by general resolutions agreed upon in a conference of brief duration. It was felt that such matters could be successfully dealt with only with the aid of experts in business, in law, and in economics, continuously engaged in studying and in exchanging views upon the underlying problems. What a general body in session for a very brief period could not attempt to do, a smaller and more representative body, endowed with power, and furnished with adequate means to carry on its work over a term of years, might reasonably hope to accomplish.

The Financial Conference, therefore, recommended to the participating governments the establishment of a body, for which they proposed the name International High Commission, which should study in general the means of carrying into effect the purposes of the Pan American Financial Conference as expressed in its resolutions, and, in particular, the solution of several major questions specifically

enumerated for the consideration of the Commission. These questions were the following:

1. The establishment of a gold standard of value.
2. Bills of exchange, commercial paper, and bills of lading.
3. Uniform (a) classification of merchandise, (b) customs regulations, (c) consular certificates and invoices, (d) port charges.
4. Uniform regulations for commercial travelers.
5. To what extent further legislation may be necessary concerning trademarks, patents, and copyrights.
6. The establishment of a uniform low rate of postage and of charges for money orders and parcel post between the American countries.
7. The extension of the procedure of arbitration for the adjustment of commercial disputes.

The recommendation of the Conference was accepted by all the participating governments, and was later acted upon by the Government of Haiti when the latter adhered to the resolutions of the Financial Conference. In several of the countries authorization and funds to carry on the work were provided by legislative action; and in the others, by executive order. In the United States, legislative authority was given by the Act of February 7, 1916, "for the maintenance of the United States section of the International High Commission," which act, besides providing generally for the coöperation of the United States Section with the other sections in carrying out the recommendations of the First Pan American Financial Conference, also provided for the participation of that section in the first general meeting of the International High Commission, which was to be held in Buenos Aires. In accordance with the suggestion of the Conference, the Minister of Finance in each country serves as the chairman of the respective national section and has associated with him eight jurists and financiers.

A vigorous start was made in all the sections of the Commission, and it was possible to hold a general meeting at Buenos Aires, April 3 to 12, 1916, under the most competent chairmanship of the then Minister of Finance of the Argentine Republic, Dr. Francisco J.

Oliver. The report of the United States Delegation has been printed¹ as has also a translation and digest of the Official Journal of the sessions of the meeting prepared by the United States Section.²

The program of the first general meeting of the Commission was essentially that recommended by the First Pan American Financial Conference; and the fact that this program remains substantially unchanged strikingly attests the discernment and discrimination shown by that Conference in selecting problems of the greatest practical importance and of continuing interest. In the course of the work, however, it has been found possible and desirable to discuss minor or cognate problems; and attention has been devoted in several cases to matters not related to the questions comprised in the original program.

For the purpose of giving effect to the conclusions reached at the first general meeting at Buenos Aires, and particularly for the purpose of carrying to a more advanced stage the proposals and projects submitted for their practical realization, the International High Commission created an organizing and directing body known as the Central Executive Council, to consist of the chairman, vice chairman, and secretary of the section of that country selected for the time being as the headquarters of the Commission. By the choice of Washington, the executive officers of the United States Section became respectively the president, vice president, and secretary general of the entire Commission, and they now constitute the Central Executive Council. The duties entrusted to the Council are: "To centralize and coördinate the labors of the Commission, to keep the several sections in constant touch with one another, to carry out the conclusions of the International High Commission and of the Pan American Financial Conferences, and to prepare the program, reports, and all other material necessary for the holding of the second meeting of the International High Commission." In addition, the Council is charged with the duty of preparing rules of procedure and other administrative apparatus for the regulation of the Commission itself.

¹ Published as House Doc. No. 1788, 64th Congress, Second Session.

² Published as Senate Doc. No. 739, 64th Congress, Second Session.

It is my main purpose, on the present occasion, to survey the activities of the International High Commission from the point of view of Pan American coöperation; but, before entering upon this survey, I desire to say a word with reference to the Pan American financial conferences and trade bodies in the United States and throughout the world. As I have stated, the First Pan American Financial Conference was called in order that from a discussion of common and peculiar problems, all might be strengthened the better to face the grave period upon which we were then entering, and the end of which we do not yet see. The war made necessary a quick inspection of all the details and supports of the economic fabric of the world, and in the United States to a greater extent than had ever before been the case, we had to examine into the nature and conditions of our foreign trade. I would not assert that a serious and intelligent interest had not been taken in this subject by economists, financial leaders, and industrial pioneers, but on the whole we were so absorbed in the extraordinary expansion of our domestic commerce and industry that during a long period in our national history, the activities of our earlier years in the regulation of international trade were largely lost sight of. The outbreak of the European War, however, had quickened all the processes of production and had necessitated the closest attention to the problem of assembly and distribution of all manufactured products. We discovered all at once how vital and directly interdependent were all the supports and elements of the great fabric of international commerce, and we looked with a new appreciation upon the international regulation of commerce, to which organizations such as the Congress of Chambers of Commerce had before the present conflagration, given such intelligent attention. With the standing committees of the International Congress of Chambers of Commerce, with other international trade organizations, and with associations especially dedicated to the promotion of the foreign trade of the United States,—with all these bodies, the Pan American Financial Conferences may expect constructively to coöperate.

It will be instructive briefly to survey the work that has been done by the various general and special organizations, set on foot by

the American Republics, with a view to ascertain what has been the most successful type of coöperation, as well as whether it is possible to isolate and define any common element in all these movements. If such an element be discernible, it will amply reinforce the authority which the International High Commission derives from earlier and contemporaneous organizations and programs for Pan American coöperation.

Four International Conferences of a general character have been held by the American Republics: at Washington in 1889-1890; at the City of Mexico in 1902; at Rio de Janeiro in 1906; and at Buenos Aires in 1910. The Fifth Conference was to have convened at Santiago de Chile in October, 1915, but because of the war was indefinitely postponed.

The International American Conferences opened a new era in international relations. Diplomatic congresses had been held, and technical conferences, for the consideration of nonpolitical and non-diplomatic questions, had marked with increasing frequency the course of the late nineteenth and twentieth centuries. But the International Conferences of the American States differed essentially alike from the political and diplomatic congresses and the technical conferences. The First Pan American Conference was summoned for the purpose of effecting a frank exchange of views not only upon problems arising from the relations between the American Republics, but also upon problems common to several or even peculiar to one or the other of the participating states. One of the chief results of this first conference was the establishment of the institution we now know as the Pan American Union, which is not merely an agency for the gathering and dissemination of information concerning the American nations, but serves to bring constantly into relief the impressive conception of ever increasing friendliness between the nations of America.

Perhaps note may be made here of the fact that one of the fundamental principles underlying the establishment of the Pan American Union has guided the work of the International High Commission. Both institutions endeavor to make the most of the coöperation of related bodies and groups of the American Republics. The International High Commission depends not only upon the technical staff

which it possesses in each country, under the chairmanship of the respective Minister of Finance, but counts upon the coöperation of legal, financial, and commercial organizations of local and national extent. While the processes of research are formulated along uniform lines by the Central Executive Council, the process of application of the results of such research so as to secure a reasonable uniformity of legislative and administrative methods is wisely left to the respective national sections and allied organizations, for these alone may be expected to know with authority and accuracy how to apply the general principles to the various domestic situations.

It may be instructive to take each of the topics on the program of the First Pan American Conference and follow it through the successive conferences, finally pointing out what action, if any, the International High Commission has contemplated taking upon it; and in the same way topics which appear for the first time on the programs of the second, third, and fourth conferences may be mentioned. For greater simplicity these observations are presented in tabular form.

SUBJECTS ON THE PROGRAMS OF THE FOUR PAN AMERICAN CONFERENCES
(WASHINGTON, 1889-1890; MEXICO CITY, 1902; RIO DE JANEIRO, 1906; AND BUENOS AIRES, 1910), TOGETHER WITH AN INDICATION
OF THE RESULTS OF THEIR CONSIDERATION.

1. *Measures tending to preserve peace and promote prosperity of the American States.* A resolution was adopted recommending the negotiation of treaties of commercial reciprocity between the governments interested in making them. So far as the records show, the subject of commercial reciprocity treaties has not been given formal discussion at any of the Pan American Conferences. Not until the first general meeting of the International High Commission at Buenos Aires in April, 1916, was the subject formally revived in the shape of a resolution adopted by the Commission as follows:

Resolved that in view of the important advantages to be derived from the speedy adoption of an American Customs Agreement to correct the industrial and fiscal situation created in each country by certain consequences of the European War, this topic be included in the program of the next Pan American Financial Conference.

The several Sections of the International High Commission shall prepare the necessary material.

The Central Executive Council will prepare a concrete list of suggestions designed to carry out this resolution.

2. *Measures looking to the promotion of an American Customs Union.* The first Pan American Conference agreed to have published a common commercial nomenclature in the four official languages of America, in which compilation would be included all the official names of articles of merchandise upon which import duties were levied. This commercial nomenclature was published in 1897 by the Bureau of American Republics, as the Pan American Union was then called. From that time the Pan American Conferences have regarded customs questions exclusively from the technical point of view, especially in regard to customs regulations and classification of merchandise. Attention to the subject of a Customs Union was not again given until the meeting of the International High Commission at Buenos Aires as noted above in paragraph 1.

3. *The establishment of regular and prompt communication between the ports of the several American States.* The first conference recommended the granting of subsidies and other assistance to steamship lines, so as to improve inter-American communication. The third conference (Rio de Janeiro, 1906) reaffirmed the necessity of action looking to the extension of steamship lines. The fourth conference (Buenos Aires, 1910) likewise urged the establishment of more rapid steamship service between North and South America and directed the Pan American Union to work to this end. The Pan American Financial Conference at Washington devoted especial attention to the question of communications and urged the governmental co-operation of the American Republics to bring it about. Finally the International High Commission, at its meeting in Buenos Aires, definitely invited the participating governments to coöperate with the Government of the United States as far as possible in the realization of that government's plans for greater steamship facilities.

4. *The establishment of an intercontinental railway.* The first conference appointed a committee which is generally known as The Permanent Pan American Railway Committee. This organization was directed to carry on surveys and to make reports not only as to technical matters but as to the general commercial advantages likely to accrue from the development of sections of the intercontinental railway. The Permanent Pan American Railway Committee has submitted detailed reports to each of the subsequent Pan American conferences; and in the spirit of its work, — perhaps to no small extent assisted by its work, — sections of the proposed trunk line have been built from time to time until there remains a gap of barely 2700 miles of over 10,000 between Buenos Aires and New York. It is true these 2700 miles represent the most difficult section of the intercontinental system, — through Colombia, Ecuador, and Northern Peru. At its meeting in Buenos Aires the International

High Commission urged the completion of this system, and, consequently as a means to this end, the fullest assistance to the Permanent Committee in the carrying out of new technical surveys. The Central Executive Council is now considering how it may best coöperate with the committee in taking up the last part of the task assigned in 1890.

5. *The establishment of a uniform system of customs regulations and uniform customs documents; classification of merchandise; port dues; and sanitary regulations concerning imports.* The first conference recommended the preparation of uniform types of customs documents and the consolidation of all port dues into single charges. It urged that consular fees be made uniform. The second conference recommended the holding at New York of a technical customs congress. It was duly held in New York, January 15 to 22, 1903, and submitted to the participating governments a special program looking to uniformity in customs regulations. The third conference directed the Pan American Union to make a scientific investigation of these subjects with a view to final action at a subsequent conference. The fourth conference prepared and submitted a uniform consular invoice and manifest; and it further recommended immediate action to bring about uniformity of customs regulations. By direction of the Pan American Financial Conference, the International High Commission has given foremost attention to each of the subjects grouped under this heading; and the Central Executive Council is now submitting to the various sections of the Commission definite and concrete programs of adjustment and harmony of statistical systems, customs regulations, and documentation.

6. *Uniformity in patent, trademark and copyright law; and uniform system of weights and measures.* The first conference recommended the adoption by all the American Republics of the patent and trademark treaties concluded at Montevideo in 1889 between the states of continental South America. At the second conference new treaties on trademarks, patents, and copyrights were signed; but these treaties proved impracticable and were replaced by other conventions, both at the third and finally at the fourth conference. The International High Commission has bent every effort to secure the ratification of the conventions entered into at the fourth conference, and expects that the Trademark Registration Bureau (at least for the northern republics) will be set on foot within a short time, through the ratification by a sufficient number of countries in the northern group since the establishment of the Commission.

With reference to the metric system, no conference has gone beyond the step of the first in recommending its adoption by all of the American Republics; the International High Commission now proposes its use in all customs documentation.

7. *The adoption of a common silver coin to be used by each government, and to be legal tender in all transactions between the citizens of*

all the American States. The first conference recommended the calling of a commission of monetary experts to discuss this question from its technical aspects, and in connection therewith the conference recommended the early establishment of an inter-American bank. In 1891 the Monetary Conference met at Washington with representation from thirteen republics. It dissolved without having done more than recommend common action looking towards the adoption of bimetallism. The third Pan American conference requested all the governments to supply the Pan American Union with a detailed study of their monetary systems, with a view to establishing the principle which would underlie the stability of international exchanges. The Financial Conference of Washington revived the idea of seeking to bring about financial stability, and submitted the problem of the gold standard to the consideration of the International High Commission. At its meeting in Buenos Aires the latter body agreed on a uniform money of account for statistical and exchange purposes, and studied other bases for more stable conditions in international finance.

8. *Plan of arbitration of all questions, disputes and differences between American States.* At the first conference, a plan of treaty was adopted which provided (1) that arbitration should be obligatory as to all questions except those which imperil national independence, and (2), that even in this case, arbitration should be obligatory upon the adversary power. It was resolved that while the treaty of arbitration lasted the principle of conquest should not be recognized. The plan of the first conference was not ratified. At the second conference (Mexico City, 1902) a treaty governing the rules of compulsory arbitration was signed, but again this failed of ratification. At the third conference in Rio de Janeiro it was decided to adhere to concepts of international peace and the principles of arbitration developed at the Hague Peace Conference.

At the second conference a treaty was proposed and signed providing for the arbitration of pecuniary claims by the citizens of one country against the government of another. The third conference approved the treaty prepared at the second and extended the life of the treaty in question. The fourth conference prepared a new convention on pecuniary claims which has been ratified by eleven republics.

The settlement of commercial disputes between the citizens of different countries has been the subject of study for some years in some of the large international trade associations, successful treatment of the question culminating in the work of the International Congress of Chambers of Commerce. On the basis of the work foreshadowed by the latter body, the Financial Conference of Washington was able to recommend the extension of this process throughout America; and the Commission and Central Executive Council have encouraged and are now vigorously promoting the adoption of the practice of commercial arbitration in the form worked out by the Chambers of Commerce of Buenos Aires and of the United States.

9. *Sanitary conferences and conventions.* The second conference recommended the holding of a sanitary conference with a view to the evolution of sanitary conventions adequate to insure healthy conditions in the carrying on of international commerce. A series of sanitary conferences have resulted from this resolution, the first being held in Washington in December, 1902, followed by the second again in Washington in 1905, and later conferences in San José de Costa Rica and Santiago de Chile. The fifth sanitary conference was to have taken place in Montevideo in 1916, but was postponed because of the war.

The third Pan American conference in Rio de Janeiro in 1906 indorsed the convention signed at the conferences of Washington, and adopted a resolution in favor of more stringent regulations.

At the request of the United States Section of the International High Commission, especial consideration was given at the general meeting of the Commission at Buenos Aires in April, 1916, to a plan for the standardization of sanitary regulations upon imports. The plan was referred by the Commission to the next sanitary conference for an expression of the views of technical experts.

10. *Postal communication.* Incidental to the consideration by the first and second conferences of the problem of improved steamship facilities was the question of more adequate mail transportation. The third conference considered specifically the question of improved postal facilities, as did the fourth. The Pan American Financial Conference considered the improvement of postal facilities and the conclusion of parcel post and money order conventions of sufficient importance to warrant the placing of these matters on the major program of the International High Commission. The Commission resolved in favor of the holding of technical postal congresses, such as that held at Montevideo in 1911, whereat a South American Postal Union had been established along the lines of the International Postal Union of Berne. As a result of the action of the International High Commission at Buenos Aires, the South American Postal Union is now a Pan American Postal Union; and the Second Postal Congress will be held as soon as practicable for the purpose of considering the further conclusion of parcel post and money order conventions, as well as for examining into the feasibility of reducing postal rates.

11. *Commercial museums.* In addition to the general instructions to the Pan American Union to foster the exhibition of American products wherever possible, encouragement has been given at nearly all subsequent Pan American gatherings to the promotion of semi-public exposition enterprises. The International High Commission adopted a resolution recommending the establishment of permanent expositions in the leading cities and capitals of all the American republics under governmental patronage. The Central Executive Council reserves the study of this question until it will be practicable to survey the whole question of international expositions.

12. *Bibliographical agencies.* The fourth conference adopted a resolution in favor of the establishment in all of the American republics of national bibliographical bureaus similar to those then existing in Argentina, Chile, and Peru. At the meeting of the International High Commission a resolution was adopted in favor of a Pan American Bibliographical Review under official auspices. A similar resolution was adopted at the Argentine Historical Congress in the summer of 1916. The Central Executive Council of the International High Commission has already entered into correspondence, through the respective sections, with those in a position to facilitate the realization of this plan.

In order to make complete the survey here presented of the substantial matters which have come up for consideration at the various Pan American conferences or technical gatherings it seems desirable to enumerate two topics which appeared for the first time upon the program of the International High Commission.

1. *Commercial law: with especial attention to the law of negotiable instruments.* Consideration has been given by the Commission to the problem of making reasonably uniform the law of bills of exchange and checks, the law of bills of lading and the law of warehouse receipts, as between the American republics. In addition, the Commission is considering the subjects of conditional sales, the organization and operation of stock companies, and the conditions governing the issue of telegraphic drafts and remittances. Some consideration has also to be given by the Central Executive Council to the problem of codification of admiralty law.

2. *Uniform regulations concerning commercial travelers and their samples.* The Commission has endeavored to secure the consolidation of all municipal or provincial licenses, regulations and fees, into national licenses and fees. The Council has proposed to the several sections a definite procedure aiming at this result.

Clearly, the scope of the programs of the various general and special Pan American gatherings have embraced almost every field of human activity. The Scientific Congresses have assembled for us a vast amount of valuable material to make possible more systematic and profitable study along many branches of science. Naturally quite a different procedure has been followed in constructing programs of special bodies such as those of the Commission of Jurists and of the Postal Congresses.

On the other hand, the work of the Pan American Conference and of the First Pan American Financial Conference has embraced

widely different matters, the relation of which is not apparent at first glance. Distinctly different types of talent and training are called into operation by the subjects that have been considered at these gatherings. Fiscal questions, administrative questions, problems of commercial law, and no small number of political and diplomatic questions have been submitted for the study of these conferences. Very often some problems have recurred from one gathering to the next; thus the question of classification of merchandise, uniformity of customs regulations and documentation has been handed down, not only from the first Pan American Conference of 1889-1890 but even from earlier meetings of official inquiries, such as that of 1884.¹

Parallel treatment of some of these questions has been engaged in, at least theoretically, by several of these bodies during a given period, and whatever may be the disadvantage of independent and unco-ordinated treatment of any subject, the advantage of the presence of this subject on the programs of different organizations at one and the same time has seemed to outweigh any argument for the division of labor. Why should this be the case, and where must we look for the final criterion as to what should go into the programs of the general Pan American gatherings?

It will be seen that ideas often gain currency in one of the American Republics and are later taken up in others and the forms of their expression readily expand until they include all the American States; in political matters, in technical matters, in theories of law, in programs for the promotion of financial and commercial relations thus it has seemed, and so very properly it will continue to seem, desirable that a formula capable of accurately setting forth the corresponding needs of any given Republic of the American hemisphere should be so conceived as to be capable of equally satisfactory application in each and all the others. And this, I hasten to add, does not mean an aimless uniformity for its own sake; for nothing could be more

¹ Report of the "Commission appointed . . . 1884, to ascertain and report upon the best modes of securing more intimate international and commercial relations between the United States and South America." House Doc. 226, Second Session, 48th Congress, Washington, 1887.

foreign to the ideals of this hemisphere than a denial of the great advantage to be derived by us all from the contribution of each of us not only individually, but in and through our national states, of our own particular talent and natural genius. Let each nation possess sovereign control and jurisdiction in all matters of legislation and policy; but let each so form its legislation and policy that the other will see much therein worthy of approximation if not substantial imitation. That, perhaps, has been an aspiration of American liberty and has inspired the development of our international policies towards each other. There have been difficulties, and there exist today difficulties, which require patient, pacific, and conciliatory examination informed by a spirit of exacting justice and a knowledge of the inevitable law of historical compensation. It is our hope that the experience of this generation will strengthen us all to devote to the solution of such questions every quality of forbearance and enlightenment of which we are capable. The basis for this hope may be found in that now familiar phenomenon of Pan American relations,—an international meeting held for the avowed purpose of working out a principle of coöperation thoroughly in harmony with the several national aspirations.

Perhaps the same desire for coöperation and realization of the necessity of sharing equitably the best that any of us could produce in legislation, administrative methods, or theories of law and of science, will explain the duplication of agencies and activities. The things that are needed press constantly for public attention in one country or another and give rise to movements for international consultation and comparison of experience. Wherever the result of such conferences has not been immediate and apparent,—and in the nature of social, juridical, and economical problems, it could neither be immediate nor apparent,—there has been a desire to bring this result about more quickly through another type of movement. If the discussion of a fiscal problem at one conference has not led to the devising immediately of a program of coöperation, it has been promptly suggested that another, and this time a technical conference, be held to arrive at a solution. Not infrequently there has thus been given impetus to a new organization which will pursue its efforts

to deal adequately with the given question. Thus we arrive at a repetition of topics from one conference to the next and in parallel organizations, not, however, without registering progress through careful consideration and instructive discussion.

But if the need for the formulation of common policies and the approximation of relations is so great that the countries of this hemisphere are impelled frequently to compare notes, how is it that the result of their comparison is so slight, and why does comparatively little come of the gatherings of their official delegates in conference? Here, perhaps, we touch the most difficult and again the most important consideration in all this matter. For the cause of this failure is obvious; it is the lack of continuity in our organizations and our own unwillingness to grant them more than a merely nominal juridical personality. Our conferences meet at intervals, maintain short sessions, adopt resolutions, and dissolve without constituting any properly qualified agency to carry out their resolutions in the spirit in which they were prepared. Each time a conference occurs, its character, objects, and program have to be considered *de novo* by the responsible authorities, in order to decide with what limitations it may be proceeded with. Nor is there always a certainty that an agency recognized for the definite purpose of carrying into effect a given program, such as the conclusion of a convention, will enjoy reasonable freedom in its activities. Therein lies the paradox in the Pan American movement: the desire for common counsel and coöperation contrasted with the unwillingness of most of the countries to be bound by any engagement which should in the slightest degree restrain their freedom of action or impose obligations to recognize and coöperate with institutions in the creation of which they have acquiesced, at the same time conceding juridical status.

The paradox yields and vanishes when we give our attention to the question of the importance of political sovereignty. Just as it is vitally necessary that the leaden cast of uniformity in methods of government be not imposed upon the different peoples which inhabit our continent, so is it even more necessary that the assurance of *political* freedom be ever present and be threatened by no combination of circumstances as far as human vision can reach.

It is a wholly comprehensible and praiseworthy attitude on the part of American statesmen everywhere that they have shown extreme caution in dealing with matters in any way involving the slightest shadow of hypothecation or the imposition of the merest condition upon the freedom of any one state as regards other states. Necessarily to some extent, every international agency which requires juridical status has to secure it through the accustomed channels, regardless of the fact that once this recognition shall have been accorded and its work begun, this agency may rarely have occasion again to have recourse to diplomatic channels. But if it enjoys continuity of existence and means of physical support, such an agency can make due provision for the initial period of scrutiny and weighing in the balance to which it will have to be subjected before being permitted to carry out the objects for which it was created.

The Pan American Conferences have not created many such agencies, and in consequence the realization of their wishes has rarely survived their own adjournment and the reference of their resolutions to the department of foreign affairs of the governments participating. Occasionally such an agency has appeared; in one sense, as I have already cited, the Pan American Union is such an agency, which, besides having all the elements of permanence and of great activity on account of its intimate association with the diplomatic representatives of the American Republics, is likewise a symbol of international friendliness and political harmony. The Permanent Pan American Railway Committee has been such an agency, and has served to carry out mandates imposed upon it many years ago and to do a particularly difficult technical piece of work. Here, one sees at once, the Pan American Conferences have assured the objects respectively sought,—a ready and active means for expressing the community of interests, and the realization of a great railway survey for the promotion of the general interests of the American Republics.

In the International High Commission we believe that we have found an instrument capable of addressing itself to many of the questions previously taken up without practical results. The Commission is a permanent body. It is a technical body. It will be

concerned with technical questions lying outside that province which we understand when we use the expression "international affairs" and "diplomatic relations." It is true, certain of the Commission's proposals have been submitted in due time to those within whose jurisdiction lies the power to grant authority and to confer the stamp of law, but it is only the results of the Commission's work which have to find expression in diplomatic conventions and legal documents of a similar character, and not the actual transaction of the work itself. No better illustration of this could be found than the fact that, since its inauguration in the summer of 1915, the Commission has been concerned almost exclusively with the substantial merits of the questions upon its program and has only now reached the stage when it is necessary to give form to its results through the devising of international conventions or, indeed, through the preparation of its own code of regulations or, if you please, its own formal constitution, which sooner or later it must submit to all the participating governments for a justification of the juridical recognition accorded by them. It may be said, in passing, that the Central Executive Council having now made a general survey of the questions on the program of the Commission and achieved a certain measure of progress in regard to some of these matters, will prepare the rules of procedure and other administrative apparatus for the Commission itself.

As the Central Executive Council surveys the two years of activity since the close of the Financial Conference, and measures the work confronting it, it feels confident that it has correctly grasped the principle of Pan American coöperation so long and loyally sought. That principle involves the steady effort on the part of a group of representative men in each Republic to adapt their national legislation so as the better to harmonize in social and legal fields with that of the other nations. It is the principle which excludes, so far as tangible and specific results are to be hoped for, the consideration of other than technical and nonpolitical questions. To the diplomatic gatherings and to those concerned with international public law must be relinquished all contrivances which concern the foreign policy and intercontinental relations of the Americas. The principle of Pan

American coöperation, moreover, involves a reasonable attitude toward the genius of the law and institutions of the historic cultural groups which compose the nations of this hemisphere. We no longer seek to unify rigorously the law of bills of exchange for the hemisphere; our aim is now that the peoples of Central and South America shall adapt their negotiable instruments legislation to the most liberal and scientific models existing within the fields of their own legal tradition, that is to say, — within the Roman or civil law. We no longer aim at a single code of customs regulations for the American Republics; our object is only to remove from *existing* codes those provisions which most offend against the nature of commercial intercourse. We no longer propose an international coin for the American Republics, for we realize how discredited is the idea of establishing an international money for independent and nonallied states, although one may very properly aim at so influencing monetary tendencies as to leave in the way of international exchange as few obstacles as possible. It is true that the Commission has adopted a uniform money of account, but this has hardly been with a view to the establishment of a uniform coinage, rather for the facilitation of exchange transactions and for the simplification of international statistics. A reasonable identity of method and a reasonable harmony of criteria is, therefore, what the Commission aims at and what we believe to be an essential element in the principle of Pan American coöperation.

No one will make the mistake of construing what we have said as jubilant confidence of the complete success of the International High Commission, or as indifference to the long and honorable series of Pan American Conferences which have gone before. The Pan American Conferences must continue to be held and their programs must embrace as diverse topics as ever, for they are after all the Conferences *par excellence* of the American States, with all the solemnity and dignity of an Amphictyonic Council. The Pan American Financial Conferences must continue to be held, for they supply particularly good opportunities for the promotion of wide acquaintance among financial and industrial leaders in the several Republics, as well as for discussion of general trade problems. As for the Commis-

sion, it realizes accurately, I am sure, the many obstacles it will have to overcome, but it feels that by bringing to bear a constant and patient attention to the technical and legal questions submitted to it, it will have demonstrated successfully its correct appreciation of the fundamental principle of Pan American coöperation.

W. G. McAdoo.

SHALL THERE BE WAR AFTER THE WAR?

THE ECONOMIC CONFERENCE AT PARIS¹

GERMANY is preparing to rehabilitate her industry and commerce after the war shall end and the entire world is interested in knowing what plans for rehabilitation she will adopt. There are two types of commercial policy which have opposite effects on the countries immediately involved and on the remainder of the world. One plan is pacific and makes for general prosperity. Each country makes gains by conferring benefits on those with which it deals, and international trade comes to resemble private traffic, in which all parties thrive and by which entire populations are bound together in amity and peace. Carpenter, shoemaker, blacksmith, and wheelwright carry on their several trades within the limits of a village; each, in his specialty, does far better work than others in that same specialty could do, and all of them get good houses, shoes, iron work, wagons, etc., instead of such bungling imitations as jacks-of-all-trades could make. It is by commerce conducted on this plan that Germany thrived mightily till she plunged into war.

Entire nations are never such restricted specialists as are the different artisans in a village, and they are less dependent on each other. A nation might, conceivably, seclude itself from all commercial dealing and live a self-contained existence; but it would have to be done at a grievous sacrifice, and the Crusoe-like nation would cut off friendships as well as gains by its policy. Interdependence makes for peace as does the opposite for hostility in nearly every human relation, and on the international scale it means a strong beginning of organic union and lays deep material foundations for the coming federation of the world. Single states can grow and thrive only by falling into

¹ The recommendations of this conference were published in the Supplement to this JOURNAL for January, 1916 (Vol. 10), p. 227. See editorial comments upon them in the JOURNAL, October, 1916 (Vol. 10), p. 845, and in this number, *supra*, p. 847. — Ed.

line with world development, doing their share of the world's organized work and getting the returns that fall to them.

The opposite policy makes for war as surely as the first makes for peace. In character it is as sharply separated from the former policy as literal militarism is from peaceful industrialism. It aims to seize rather than to give and to crush and supplant rather than to benefit. Each of these two courses has, from time immemorial, been advocated and, in certain places, practiced; and states have often adopted policies which, in a measure, combine the two courses. Invariably, however, belligerency in trade makes for literal belligerency, and vice versa. Given too much anti-social action in commerce, and you are likely to have war. Given a great war and, as an aftermath, we may have anti-social practices in commerce.

At the Economic Conference held in Paris in June of last year the Allies declared that the Central Powers of Europe were preparing, in concert with their allies, for a contest in the economic field and that the states in the Entente should defend themselves by counter-measures. They acted on that plan and announced a program of drastic prohibition of importation of goods from enemies' countries, the cancellation of contracts with enemies and relatively free trade with each other, the liquidation of corporations partly owned by subjects of hostile countries and the continuation of the blockading policy whereby, during the war, commodities needed by enemies are, by all available means, prevented from reaching them. The plan involves corresponding measures for conserving the commerce of the allied nations with each other and with neutrals. The aim is the establishment of a self-contained circle of nations commercially and financially independent of the Central European circle. It is all retaliatory and is induced by the belief that Germany and the quasi-vassals that she controls were preparing to initiate a war in trade and finance as, three years ago, she initiated one of a military sort.

Now it should be evident on the face of the facts that it is as impossible for two leagues of nations to cut each others' throats, in an economic way, and still thrive as it is for opposing bodies of men to cut the throats literally and do so. And it should be evident that the figurative throat-cutting tends very strongly to induce the

lateral cutting. The memorable words of President Wilson, in his recent reply to the Pope, express these facts most forcibly: "No peace can rest securely upon political or economic restrictions, to benefit some nations and cripple or embarrass others, upon vindictive action of any sort or any kind of revenge or deliberate injury." Appearances convey the impression that the world as a whole is preparing to commit *hara-kiri* by permanent trade war involving a wealth-wasting and life-destroying policy.

It is far from following that the Allies should at once relinquish the policy which they adopted at the Conference of Paris. They are engaged in a war which their enemy entered fully armed and equipped, while they entered it comparatively unarmed and defenseless, and it is not likely that, if an economic war is coming at all, they will be willing to enter it under a corresponding disadvantage. Preparedness is necessary in either kind of contest. If the Allied armies win, the economic superiority that their countries will possess will correspond with their military superiority. They will constitute a far better self-contained circle of nations than would Germany and her allies. Unless Germany succeeds in greatly enlarging her area, she will be far more dependent on other nations for necessary articles than they are upon her. The countries in the Entente, enlarged as it is by much of America and Asia and in control of Africa, could throttle Germany as she could not hope to throttle them. They could measurably thrive without Germany, while she could, at most, manage to live without them. What this proves is not at all that they should insist upon the economic war. A victor in such a war may be better off than the vanquished, but both of them will surely be better off if there is no war at all. The fact that the Allies can, if they will, retort crushingly upon Germany, if she announces a trade war against them, should afford a very complete guaranty that she will not try it.

What will practically be done depends very largely on which armies win in the present war, and it would be wholly in the spirit of German policy, in case she should be the winner, to crush her late antagonists by economic enactments as ruthlessly as she would have crushed them by shells, gas, liquid flame, and other diabolisms.

The spirit of the Allied Powers and their habitual practice would, in case they win, incline them toward becoming within themselves a commonwealth of nations and practicing a live-and-let-live policy with all other states, rather than toward carrying on a war in the realm of trade. The policy announced at the Paris Conference is entirely fitting, as a war measure, but the sole way in which it can benefit mankind after the war is by so menacing the Central States that they will not initiate a like policy and, therefore, will not call out retaliation. The plan should never be anything else than a menace. If it were put into practice, even though Germany were helpless and compelled to submit to it, the Allies themselves would feel its injurious effects and the neutral world as a whole would feel them; and the fact that the Middle European States would feel them more keenly would not remove the evil done elsewhere. It would be chiefly efficient in making peace insecure.

This, then, is the alternative which the world has before it after the conclusion of the war: on the one hand, policies by which the nations shall thrive together and, on the other hand, those by which they will suffer together, though in unequal degree; and it is safe to say that the record which Germany has made indicates that the amount of suffering which she would inflict upon conquered nations vastly exceeds the amount which the Entente and its Allies would ever dream of inflicting on her. Witness the plan, seriously proposed, for crushing the life out of the annexed portion of France, by measures which would force its inhabitants to buy goods from Germany on German terms and sell needed goods to Germany, also on German terms. Witness the denuding of Belgium of her necessary machinery, to say nothing of the deportation of her laborers, the financial extortions, etc. Witness the contrast between the management of German colonies in matters of trade and that of the English colonies. The economic throttling of the conquered world is bound up with a German victory. This would be "German peace" with a vengeance. Economic liberty, like political, is bound up with an Allied victory, which would give promise of that abiding peace for which all the world is hoping and most of it is fighting.

JOHN BATES CLARK

VIOLATION OF TREATIES: BAD FAITH, NONEXECUTION AND DISREGARD

I. BAD FAITH IN CONTRACTING

GRADUALLY there has developed a system of treaty negotiation which eliminates all possibility of bad faith in contracting, unless the *mala fides* is both deliberate and long-lived. Modern treaty technique accounts for this, the stages of a treaty from negotiation to entry into force having been developed to serve this very end. When kings alone ruled in the brave days of old, only signatures, bolstered up on occasion by oaths, giving of hostages, etc., were employed to give faith to such documents.¹ But practice now recognises other steps. In the United States there are four steps to be taken after the signing before the treaty is fully binding: the advice and consent of the Senate to ratification, ratification by the President, the exchange of ratifications, and proclamation by the President. All of these stages are necessary to make a treaty binding upon the citizenry of the United States, and together they will ordinarily require a period of several months for their fulfillment. The inevitable conflict between the executive negotiators and the legislative department renders it impracticable to negotiate a treaty against which any suspicion of inability to keep it may arise. This suspicion does arise frequently because of the different points of view of the executive and legislative departments of government. The American system is growing popular among states. All South America employs it in

¹ "When prudent princes rode to an interview surrounded by armed men, met on a bridge, and conversed through a grating, it was no strange thing that treaties should be broken as fast as they were made. To us, however, it may well seem strange that acute and sagacious men should not have discerned both that these varied and redoubled promises rested on nothing at all but the good faith they were meant to fortify, and that a penalty which is nugatory, or a pledge which can be circumvented, is not only ineffective but worse, because it lends a treacherous satisfaction to the conscience, suggests the very subtleties that elude it, and assists the easy work of self-deception." — Mountague Bernard, *Four Lectures on Subjects connected with Diplomacy*, 192.

essentials, and in Europe it is coming into vogue as a subject for propaganda.

Technically, signatures to a treaty are now held to indicate only that the negotiators have faithfully carried out their instructions from the executive. Signatures are subscribed "in faith" (*sub spe rati*), and their legal effect is now nil. So far as they indicate anything legal, they point simply to a consensus of the negotiating minds, backed by the executive department of government. The executive has had a long and losing fight in the United States with the Senate over its part in ratification. The Senate's attitude has been that a treaty in full force and effect is binding upon all the people whom it represents. Therefore its function is real and not perfunctory. Constitutionally the President cannot ratify a treaty without the precedent advice and consent of the Senate. But when he does ratify, the treaty has not yet reached its full force and effect. For ratification is a governmental, not a popular, act, and it is binding only upon the performing government. The other government also has to ratify. The treaty being at this stage, the ratifications, or rather the ratified copies, are exchanged. On one of these the ratifying signatures, as distinct from the negotiating signatures, read A B, and on the other B A. The treaty is now legally binding on both governments, and in many states this is considered enough. In the United States, however, proclamation is still required. The President thereby publishes the treaty to the people, which then binds them. It is in this form that treaties are printed in Statutes at Large and in the Treaty Series, though in most collections of treaties the formal proclamation is omitted for considerations of space. Its date is carefully noted at the head of the American treaty, but most other governments are superbly careless about noting the stages following the initial signing.²

² Exchange of ratifications is now customarily noted in texts published in the two great and continuous collections, British and Foreign State Papers, and Martens' *Recueil général de traités*. The British Treaty Series notes only the exchange of ratifications, but an annual number of the series lists accessions, withdrawals, etc., which in the case of multipartite conventions indicates deposits of ratifications, reserves, etc. The good practice of the United States Treaty Series of recording every essential action toward rendering a bipartite treaty effective by both contractants seems not to be followed elsewhere, as it deserves to be.

All of this refers to bipartite treaties. Multipartite conventions, such as those of The Hague, go through the same stages, except that the exchange of ratifications is not practicable in the same way. State ratifications are in such cases deposited with the state that was host of the conference and at a definite time all the ratifying states draw up a protocol certifying to their deposit. Later ratifications or accessions are certified to contracting Powers by a circular note from the state with which deposits are made. This system has been used since 1648 with increasing insistence. It would be a valuable addition to this system if an international depository office for conducting the details of the ratification of multipartite conventions and for preserving original texts were in existence.

This system of guarding the faith of treaties is a modern development. In none of the older writers is it discussed at all, and there are few accounts of it among the current authorities. Space forbids even an examination of its interesting legal aspects, which might form a separate study. Grotius and Pufendorf mention ratification, but are of opinion that it is quite incidental to signing, which to them is the binding act. The Peace of Westphalia was ratified *omni dolo et fraude exclusis*. Modern practice has thrown the weight in the other direction and has added a definite rule that ordinarily treaties do not enter into force until the exchange of ratifications, while multipartite treaties usually contain a provision stipulating that, as in the case of conventions relating to war, the document holds only when all parties are bound by it. This provision automatically throws the 1907 Hague Conventions out so far as the present European War is concerned, though the 1899 texts are binding. Frequently, after ratification, the treaty is considered effective for practical purposes from date of signing.

Another great deterrent to bad faith in contracting is the modern political striving for stability of international relations. This has drawn a clear distinction between the legal relations of states and their relations based on policy. An illustration will make the difference clear. The community expects an individual to conduct himself within certain bounds in the common interest. He is expected to lead a decent life, to support his family, to meet his larger and smaller

social engagements; and all of these are regulated by law or by community sentiment to such an extent that he who oversteps loses thereby. Such relations of the individual are legal or semi-legal in some degree or other. But the individual has another set of relations with the community. He has his own life to live, his own developed mannerisms, his own career to choose and follow. In the Anglo-Saxon scheme of things this order of relations is beyond the purview of the law, and for the sake of the illustration may be called relations of personal policy. As to states, a multifarious set of relations are amenable to legal arrangement and control. Within a century this order of relations has been immensely enlarged by reason of the desire for stability between states, a phenomenon which has also accounted for a steady semi-scientific searching by political scientists to determine the bounds of policy. Now an honest facing of that problem of stability, which has been occurring since the Treaty of Vienna of 1815, practically precludes bad faith in respect to what has been defined as legal relations in distinction from relations of policy. At present, policy, which is not properly the direct subject of treaties, is defined in arbitration treaties as "national honor and vital interest," an objectionable definition because no one can tell what these terms mean and almost anybody can find them where they are not. It may be mentioned that the present cataclysm will transform state policy radically and may even render states honest enough to call it by name when they are talking about it.

While the complex and lengthy process of putting a treaty into force operates from one side to make bad faith impossible in modern treaties, the desire for stability has operated to narrow the subject matter of state compacts to questions in which bad faith gains nothing worth while for the contractant. The instances of bad faith in contracting which have been found will, therefore, be discovered to belong to an early time whose conditions and problems are obsolete, and for the most part they will be seen to have been affected by military considerations.

1. Following the Schmalkaldic War in 1546-1547, Duke Maurice of Saxony began to seek the protection of Henry II of France, who

felt the necessity of alliances with the German princes to oppose the ambitious projects of the House of Austria. Henry sent Jean de Freese, Bishop of Bayonne, to Germany to negotiate with Maurice and his allies, a treaty being concluded October 1, 1551, at Friedewalde in Hesse, and ratified by Henry January 15, 1552, at Chambord.³ The treaty stipulated that the allies would combine their forces to procure liberty for the Landgrave of Hesse and to prevent the overthrow of the ancient constitution and the laws of the Germanic Empire. It was specifically agreed that no treaty of peace nor truce should be concluded without the common consent of all the confederates, nor without each of them being informed. Maurice, pursuing his military campaign, forced the Emperor Charles V to liberate his father-in-law, Philip of Hesse. The brother of Charles V, Ferdinand, who had always been able to conciliate the Protestants, then concluded with the German confederates the Transaction (or Convention) of Passau.⁴ Briefly, it recognized freedom of religion until the next Diet. The point here is that Maurice signed the transaction without consulting or securing the consent of Henry II, as he had agreed to do at Friedewalde. "Posterity, which judges by results," says De Koch, "has pardoned him this perfidy, by which the elector overturned the vast projects of the Emperor, saved the Germanic constitution, and obliged the Emperor to renounce his plan of making the imperial authority absolute and hereditary in his house." But it was clearly a case of actual breach of treaty through bad faith.

2. One of the weaknesses of the seventeenth and eighteenth centuries habit of settling a multipartite dispute by a series of bipartite treaties was that this system presented isolated and detached transactions, which might be violated in detail without any of the parties being in a position to claim the support of its former allies for the defense of the treaty. Many instances might be cited of particular solutions necessary to secure a settlement in one case in which provisions were immediately violated by a subsequent treaty, which

³ De Koch, *Histoire abrégée*, I, 40-44; Garden, *op. cit.*, I, 10; Léonard, *Traité de paix*, II, 484.

⁴ Latin text, Du Mont, *Corps universel diplomatique*, IV, Part III, 42.

obviously could not have been negotiated in good faith. By the first barrier treaty of The Hague of October 29, 1709, Great Britain promised to cede to the States General the upper portion of Guelder with the right of garrison in the forts of Liége and Huy and the city of Bonn. By Article VII of the Treaty of Utrecht between France and Spain of April 11, 1713, the King of France, by virtue of the power which he had received from the King of Spain, ceded Guelder to the King of Prussia and his heirs and successors of both sexes to be enjoyed in full sovereignty and ownership and upon the same basis as the King of Spain possessed them, provided that the Catholic religion should be maintained as under Spanish domination. These two provisions are, of course, contradictory. By Article XVIII of the third barrier treaty of Antwerp of November 15, 1715, the Emperor ceded to the States General in full sovereignty and ownership several cities in the upper portion of Guelder, this not seeming to affect the previous treaty engagements except in point of neighbors and political influence. Instances of this sort might be multiplied almost indefinitely, and the numerous changes of territory from 1648 to 1815, though generally done under cover of treaty provisions, were frequently, if not generally, actual violations of the then current system as determined by political treaties.

3. Through Lord Hindford, George II's minister to Prussia, Austria and Frederick II of Prussia signed a truce at Klein Schellendorf, November 9, 1742, in contravention of which Frederick laid seige to Neisse on the 20th, the city capitulating on the 31st. "Whether the king of Prussia did not regard the truce as a formal and obligatory convention but only as a *pourparler*, or whether he was persuaded that it had been intended to foil him, he believed he could make use of it and profited by the Austrian indiscretion of divulging what should have remained an impenetrable secret to break an engagement of which he undoubtedly repented."⁵

4. "Austria could not cede by the Treaty of Worms of 1743 to the King of Sardinia the marquisate of Finale, of which it had previously disposed in favor of Genoa. It therefore had to in-

⁵ Schoell, *op. cit.*, II, 307. Frederick's career contains other instances of treaty breach ascribable to bad faith.

demnify, which was recognized by the Treaty of Aix la Chapelle of 1748.”⁶

5. The Emperor Joseph II visited Catherine of Russia in June, 1780, and agreed verbally with her that, in case of a rupture with the Porte, Russia and Austria would aggrandize themselves at the expense of the Turks. Catherine suggested to Joseph that he take possession of Rome and Italy and thus virtually reestablish the Empire of the West, while she would found at Constantinople a new Empire of the East. (Schoell says there is no question as to this plan, which he reports on the authority of Joseph himself from Döhm, *Denkwürdigkeiten meiner Zeit*, I, 420.) Schoell adds⁷ that it is extremely probable that Joseph obtained in this interview the promise of the Empress not to oppose his plans against Bavaria in spite of the engagements she had contracted with Prussia by the Peace of Teschen of May 13, 1779.

6. General Montesquiou, in command of French troops, entered the states of the King of Sardinia on September 22, 1792, war having been declared September 10. On September 24 he occupied Chambéry. The proximity of his troops disturbed the Genevan Republic, which had for a long time been the threshold of trouble and dissension. In 1782 France, the King of Sardinia, and the Canton of Bern had undertaken to reestablish tranquillity there, the result being a treaty of guarantee of pacification signed on November 12, 1782. The chiefs of the faction overthrown at that time sat in the National Convention of France, where they began to complain on the approach of the French army. A small council of Geneva called upon its allies, the Cantons of Bern and Zurich, to send a garrison of 1600 men. This action the Executive Council of the French Republic, by a decree of September 28, declared to be contrary to the treaty of guarantee of 1782, the second article of which states that Geneva should not introduce into its territory any foreign troops without the consent of the guarantors, France, Sardinia, and Bern. Furthermore, the council declared that the resolution of the Genevan magistrates was to be considered as an accession to the first coalition. The Executive Council ordered General Montesquiou to prevent the

⁶ Gardien, *Traité complet de diplomatie*, I, 418.

⁷ *Op. cit.*, III, 124.

Swiss troops from entering Geneva. The solution of the question was by commissioners, who signed the Convention of Landécý of November 2, 1792, which in Article IV says:

The Republic of Geneva expressly and solemnly reserves all previous treaties with its neighbors, and especially that of 1584 with the honorable (*louables*) Cantons of Zurich and Bern, as well as Article 5 of the treaty of neutrality of 1782;⁸ the French Republic understanding that the said reserve should not bind it as to the treaties in which it has not participated nor in any manner prejudice the faculty that it reserves of revising its own treaties, which it executes provisionally until the time of this revision.⁹

General Montesquiou vainly sought to obtain from the Genevan plenipotentiaries their renunciation of mentioning the treaty of 1584, but they declared that Geneva had concluded no public act without recalling this treaty and that the Genevans regarded it as the firmest support of their independence. The general was reduced to the necessity of accepting the situation, of breaking off negotiations, or of disobeying his instructions, which ordered him to insist on the complete excision of the reference. So he seized both horns of the dilemma and proposed the text as adopted, securing the reserve in the name of Geneva only and obtaining its expression in such form as not to engage France. The clause from the treaty of guarantee was inserted under like circumstances, but, says Schoell, "it was useless to recall such an engagement to a government which, like that of France, placed itself above all principles." On September 28, 1792, the French National Convention had demanded the execution of the treaty of 1782; on October 17, it passed this decree:

The National Convention, considering that the edict of Geneva was dictated by force; that the treaty of November 12, 1782, which guaranteed it, is in respect to the Genevan constitution only an engagement between tyrants to guarantee a foreign tyranny; that it is unworthy of a free people to maintain such acts; considering finally that every guarantee of a constitution is an attempt on the independence of the guaranteed power, charges the Executive Council

⁸ "The city and territory of Geneva shall still be considered neuter, every time that, being calm and tranquil, two or three guaranteeing powers may be at war among themselves, and may maintain troops in their vicinity."

⁹ Martens, *Recueil*, V, 95.

to declare to the Republic of Geneva and to the Cantons of Bern and Zurich that the French Republic on its part renounces the treaty of November 12, 1782, so far as it concerns the guarantee of the government and constitution of Geneva.¹⁰

7. An instance of bad faith through conflicting treaties is found in the Russo-Turkish treaty of 1774 by which the Russian minister was promised rank immediately after the minister of the Holy Roman Emperor, although this place had already been accorded to the French diplomat by Articles 20 and 27 of the treaty of 1604, by Article 10 of 1673, and Article 1 of 1740.¹¹

8. In the correspondence relative to peace between France and Great Britain in 1799, Lord Grenville, in a note laid before the peers on January 28, 1800, asserted that Bonaparte wrote a letter, intercepted by the English, in which he had ordered General Kléber to sign, if necessary, a treaty with the Porte for the evacuation of Egypt, but to delay the execution under pretext that the article must be previously ratified at Paris.¹²

9. Article IX of the Convention of El Arish of January 24, 1800, between Great Britain and France, provides that all prisoners would be exchanged and the property of the inhabitants of Egypt respected. The convention was negotiated by Commodore Sydney Smith, and when it was received by the British Government, the latter did not wish to permit the officers or detachments of the French army to return to France even under an engagement that they would not serve after exchange. The bad faith of the French in all engagements of this character had been proved by repeated examples, the government alleged,¹³ and England demanded therefore that it be stipulated that officers and soldiers should be detained in some part of the territory of the allies until they were exchanged. The Lords of the Admiralty had taken this decision December 15, 1799, and it was announced to Smith by a letter of January 8, which

¹⁰ The international status of Switzerland was eventually settled by the Treaty of Vienna of June 9, 1815.

¹¹ Pradier-Fodéré, *Traité de droit international*, II, 753.

¹² Schoell, *op. cit.*, V, 316. Ratification was not then considered as the binding stage of a treaty, which was obligatory when signed.

¹³ Gauden, *Histoire générale des Traités de paix*, VI, 214.

was received on February 22 at Cyprus. He hastened to Alexandria and immediately communicated with the French general, Kléber, who took the offensive immediately. The Admiralty Lords finally recognized their mistake in disavowing Smith after this incident. They announced that since the French believed Smith was sufficiently authorized to conclude a treaty and that a part of the convention had already been executed, the King wished not to oppose it, and the incident would doubtless have ended there had not the French used it for diplomatic purposes in respect to signing other conventions.¹⁴

II. NONEXECUTION AND DISREGARD

These are twin types, the first due presumably to carelessness, the second to overlooking. Nonexecution of a treaty differs from intentional violation in that it involves no overt act against the treaty. Disregard will occur when a provision is simply ignored. Nonexecution or disregard by one party gives the other contractant the right to insist on respect for the treaty or to consider itself as freed from the engagement. But whereas most violations of treaty can readily be recognized as involving a legal lesion of right, non-execution or disregard can be said rather to involve a political lesion. Chief Justice Marshall in *Foster v. Neilson* (2 Pet. at 314) said: "When the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department." Unless the political department complains to another state of its failure to execute or disregard of the terms of a document, there is nothing actionable. That is, of course, true in respect to other forms of breach, but with the difference that the other forms are of a nature to advertise their own illegal character. Failure to protest is likely to render the treaty a dead letter or to suggest assent to the existing condition.

These closely connected forms of violation are particularly dangerous to international good order. As to bipartite engagements, no grave question is likely to arise from them, because the injured

¹⁴ Schoell, *ibid.*, V, 399, 400.

contractant is sure to complain, and the resulting negotiations, reclamation, or arbitration is almost certain to satisfy both. But as to multipartite conventions the lack of proper machinery to call the violating state to account hinders a settlement. While the bulk of arbitrations concerning bipartite treaties may be said to involve either nonexecution or disregard of their provisions, there is now recallable no single case in which a multipartite convention of the international political type has thus been reviewed. Four of the multipartite administrative conventions—those on the suppression of the slave trade, the transport of merchandise by railroads, the universal postal and the wireless telegraphic arrangements—contain arbitral clauses to take care of this and other cases of violation or dispute; but these are minor documents in the political world. The difficulty in calling the recalcitrant state to account is the sovereignty theory which in effect makes each state a law unto itself, while this status is belied by the very existence of the multipartite engagements under discussion. The nonoffending state has no recognized right to recall its duty to an offending one except in the case of certain Hague Conventions. The result is that, in the case of fundamental treaties, disregard, especially, will occur without any state having an involved interest large enough or a conscience keen enough to warrant a protest. The eventual effect is that by the accretion of successive disregards, and in some cases of nonexecution, a fundamental treaty will cease wholly or largely to exist in fact, though still valid *de jure*.¹⁵ Instances of these circumstances will be given.

¹⁵ About the only difference between violation by disregard and by deliberation, which is considered later in this study, lies in the admitted knowledge of the effect of the violating act either by a lapse into honesty on the part of the government itself or from outside representation.

The situation indicated in the text was very aptly illustrated by the Treaty of Vienna of June 8, 1815, consisting of stipulations repeated from seventeen separately concluded treaties declared to be integral parts of the main treaty. As a matter of fact, the contractants of the separate treaties found it possible and technically correct to abrogate, annul, or alter the separate engagements among themselves, and thus to nullify the same provisions in the principal treaty, whose signatories were helpless to hinder this war of attrition, which from 180 pages of text in 1815, has left only 30 in force and vigorous to this day.

Without attempting to distinguish between nonexecution and disregard further, a few examples of this type of breach may be considered.

(A) PRIOR TO 1848

1. Albert, Margrave of Bayreuth and a member of the Circle of Franconia, was a turbulent person. He refused to submit to the terms of the Convention of Passau of August 2, 1552, and as the ally of France continued to make war on the Emperor and the Catholic bishops of Franconia and the Rhine. He put the Catholics under contribution, and in 1554 engaged some Circles to league themselves more closely for the common defense of Protestant interests. If this occurred now it would fall into the field of national affairs. The Edict of Worms of 1521 had prohibited all new doctrines and had been the occasion of a treaty of alliance between the Emperor Charles V and the Pope. The Diet of Augsburg in 1530 had heard and rejected Melancthon's Confession of Augsburg, but at Passau in 1552 free exercise of religion had been accorded to its adherents until the next Diet. The imperial and papal authorities were concerned in making this concession a dead letter by nonexecution, but Margrave Albert and his coöperators, allying with France because the Emperor and Pope were bound together against that country, kept the matter thoroughly alive. In fact, still other Circles followed the example of the dissidents, who were violating the terms of the Convention of Passau by their activities; for the convention was intended to keep them quiet to the advantage of the church party. At the Diet of Augsburg in 1555 they were strong enough to exact a regulation having for its object the execution of the Transaction of Passau and the maintenance of general tranquillity. This "conclusum," known as the ordinance of execution, was accorded a place in the code of German public law.¹⁶

2. By Article 7 of the Peace of Religion concluded by the Diet of Augsburg, which was convoked by Emperor Charles V in 1555,

¹⁶ Schoell, *op. cit.*, VI, 215-216. For another account of the circumstances, see David Jayne Hill, *History of European Diplomacy*, II, 476-477. Charles V at this time evidently introduced the maxim that "necessity knows no law" into European politics.

every ecclesiastic who would renounce the ancient religion to embrace the Augsburg Confession was to lose his benefice but retain his honor. This clause resulted in much difficulty later under the name of the "ecclesiastic reserve." It was scarcely signed before violations began; and these, especially during the reign of the feeble Rudolph II, brought about the Thirty Years' War.¹⁷ By the Peace of Prague of May 30, 1635, it was attempted to solve the difficulties, without success, and the war continued. The question eventually came before the negotiators of the Peace of Westphalia, 1648, where the ecclesiastic reserve appeared as one of the religious complaints, the first presented to the congress under that head. The Protestants demanded its abolition as being a clause of the Peace of Religion to which they had never assented. They consequently insisted on being allowed to maintain possession of all immediate ecclesiastical property, of which they had taken possession against the tenor of the reserve. The question had become extremely complicated in the course of a century, but the fifth article of the treaty of Osnabrück takes as a basis of settlement the Peace of Religion and the subordinate but antedecent Transaction of Passau of August 12, 1552, and section 15 of this article affects the ecclesiastic reserve. This treaty became the basis of the religious régime of Europe until religion passed out of international politics, and for the next century and more the article was, with more or less specific mention, confirmed by treaties of peace, alliance, succession, etc.

3. The Congress of Cambray was called by virtue of Article XIV of the Treaty of Madrid of June 13, 1721, to solve outstanding questions between the Emperor, the King of Spain, and the Duke of Savoy. One of the questions which came before it was that of the Company of Ostend which the Emperor had created by grant at Vienna on December 19, 1722. The company was given the exclusive privilege of navigating and conducting business with the East and West Indies and the coast of Africa for thirty years. The maritime powers, particularly Holland, claimed that the grant was in violation of existing treaties because, according to the Treaty of Münster

¹⁷ Schoell, *op. cit.*, I, 50-58; Du Mont, *Corps universel diplomatique*, V, Part 2, 43-47, 135, 147.

of 1648, the Spanish had been given a right of extending their navigation in the Orient to the Philippines, and because Article XXVI of the barrier treaty renewed between the Emperor and the States General all the commercial provisions of the Treaty of Münster. Another congress assembled at Soissons June 14, 1728, before which the Emperor did not undertake to argue against the suppression of the company, and on November 9, 1729, a defensive alliance was signed between France, Spain, and England at Seville, to which Holland acceded on November 21 on the promise of the allies that they would secure entire satisfaction for her in regard to the abolition of navigation and commerce by the Company of Ostend in the Indies. Article V of the second treaty of Vienna of March 16, 1731, between the Emperor, Great Britain, and the States General, obliges the Emperor to stop the commerce of the Austrian Netherlands to the East Indies, so that it would never be carried on either by the Company of Ostend or any other company. Whether or not this was an actual breach of Article XXVI of the barrier treaty, the attitude of Austria seemed to show that the treaty was violated. By the same article, Great Britain and the States General engaged to agree without delay upon a new treaty of commerce and a new tariff for the Austrian Netherlands, conformably to Article XVI of the barrier treaty, a provision which was never executed.¹⁸

4. Shortly after the beginning of the Third Silesian War, the Treaty of Closterseven was signed on September 8, 1757, between the Duke of Cumberland and Richelieu. According to it the French occupied Hanover. In July the French had taken possession of the landgraviate of Hesse Cassel, which was allied with Great Britain, reduced the greater part of Brunswick and Hanover, and pursued the Duke of Cumberland into Bremen. Richelieu, who affected simulated treaties in his diplomacy, was, it seems, ignorant of the convention of July 11, 1757, between France and Denmark guaranteeing the neutrality of Hanover, though he knew of the guarantee itself. The military situation existing on July 24 contemplated resolving Denmark from this guarantee under the treaty of July 11. Richelieu sent a minister to suggest to Frederick V of Denmark the idea

¹⁸ Schoell, *op. cit.*, II, 194 ff.; Garden, *op. cit.*, III, 130-153.

of mediating between himself and the Duke of Cumberland. It was thus that the Treaty of Closterseven was signed and by it auxiliary troops of the duke's army were returned to their own countries, namely, Hesse, Brunswick-Wolfenbüttel, Saxe-Gotha, and Lippe-Bückeburg. The duke was to retire across the Elbe, hostilities were to cease, and Richelieu was to remain master, until the general peace, of everything he had occupied in the electorate and the duchies of Bremen and Verden, with the exception of Stade, where Cumberland kept a garrison. The Hanoverians, encouraged by the victory of the Prussians at Rosbach, announced on December 15, 1757, that they regarded themselves as freed from the engagement of Closterseven. This resolution followed a change in the British ministry, by which William Pitt became Minister of Foreign Affairs. On November 26, he expressed the opinion that the convention should be annulled as opprobrious to England. England demanded Prince Ferdinand of Brunswick from the King of Prussia and put him at the head of the Hanoverian army, which was reinforced by an English corps and actively took the field against the French in complete disregard of the Convention of Closterseven.

3. The states of Franconia sent deputies to Würzburg and concluded a suspension of arms on August 7, 1796. By Article XII of this convention, the margraviates of Anspach and Bayreuth and the county of Schmalkald, belonging to the princes who thus made their peace, were declared exempt from paying their share of the contribution conformably to the *status quo* before the war. This last clause was inserted on the demand of Nuremberg, which represented that the King of Prussia had occupied the greater part of the territory of the two margraviates, which belonged to other states; and that these occupied portions could not be made to contribute. As soon as the convention was known, the envoy of the King of Prussia protested against this clause and the French General, Jourdan, annulled the convention under the pretext that it had not been published before it was ratified.¹⁹ As a consequence, the convention was not executed though even *force majeure* could scarcely be adduced as an excuse, for Jourdan's army of the Sambre and the Meuse was

¹⁹ Schöll, *op. cit.*, IV, 367; Garden, *op. cit.*, V, 343.

in retreat from the offensive of Archduke Charles of Austria, and it was only in Italy that the French Directory's general, Bonaparte, was in a position to dictate.

6. Louis XIV attempted in 1680-83 to take possession of parts of Alsace by the so-called Chambers of Reunion. For a century France continued to look eastward, and by Article VI of the preliminary treaty of Leoben of April 18, 1797, between Austria and the French Republic, the emperor renounced all his rights over the Austrian Netherlands and recognized the limits of France as decreed by the laws of the republic. At the time the reunion of what was later called the four departments of the left bank of the Rhine had not been pronounced by the laws of the republic and did not take place until March 9, 1801. Early in 1798 the French demanded that, by way of indemnity for the expenses which "an unjust attack" had caused France, the basis of peace between France and the Germanic Empire be that the course of the Rhine form the frontier. The secret articles of the Treaty of Campo Formio of October 17, 1797, had given France the right to demand the countries on the left bank of the Rhine and guaranteed the consent of Austria thereto on condition that the aggrandizement should not be at the expense of Bavaria. At the Congress of Rastadt France decided that Vienna could be forced to renounce the execution of the condition, and negotiations proceeded toward that end.²⁰ Negotiations continued, from March until August, and a French note of March 27, 1798, demanded particularly a statement on the indemnization of the princes owning territory on the left bank of the Rhine. The Germanic deputation responded April 4, admitting the principle of indemnity by secularization, providing the matter was in accordance with the Germanic constitution. The ministers of Austria and Würzburg were absolutely opposed to secularization. Those of Saxony and Brunswick admitted it only as a necessity. The imperial plenipotentiary at Rastadt transmitted the note of the deputation to the French ministers without giving it its approbation. It is thus evident, since the Congress of Rastadt resulted in no treaty, that the preliminary treaty of Leoben controlled the ownership of the left bank of the

²⁰ Schoell, *op. cit.*, V, 102 ff.; Garden, *op. cit.*, VI, 18-25.

Rhine, though a little later France laid specific claims to the territory and took it by force of arms irrespective of the engagements of Leoben. Article IX of the secret articles of the Treaty of Campo Formio of October 17, 1797, stated that the line traced in the first article gave to the King of Prussia his possessions on the left bank of the Rhine. Article I, which like the other secret articles was never avowed by Vienna, engaged the Emperor to employ his good offices to the end that the Germanic Empire cede to the French Republic a part of the countries situated on the left bank of the Rhine according to a line described in the article.

7. In 1798 France prepared a fleet which under Admiral Bruix left Toulon on May 19 and reached Malta June 9. At the time Malta was under the control of the Grand Master of the Order of St. John of Jerusalem, Ferdinand Hompesch, who was entitled to the prerogatives of a sovereign. By means of information procured by Bonaparte through Chevalier di Amati, the Spanish *chargé d'affaires*, a capitulation of Malta was concluded on June 12. This provided:

Art. 1. The Knights of the Order of St. John of Jerusalem will surrender to the French Army the city and forts of Malta. They renounce in favor of the French Republic the rights of sovereignty and ownership which they have over the city, as well as over the Islands of Malta, Gozo, and Comino.

Art. 2. The French Republic will exercise its influence at the Congress of Rastadt, in order to obtain for the Grand Master during his lifetime a principality equivalent to that which he now loses, and in the meanwhile, it hereby engages itself to pay to him an annual pension of 300,000 francs; two years' pension will also be paid to him as an indemnity for his furniture or private effects; he will retain during the time that he remains in Malta the military honors that he has hitherto enjoyed.

The French saw to the execution of the first article, but they disregarded the second in several respects. No ratification was provided for in the convention itself, and none occurred, so that the subsequent events might be properly judged on the basis of treaty interpretation rather than of treaty violation. Considering, however, that no complaint as to validity was made, it is perhaps legitimate to assume that the treaty was *de jure* in force, as it assuredly was *de facto*.

The terms of the second article were disregarded by the French

Directory. Its diplomats did not even exercise influence at the Congress of Rastadt to obtain for Hompesch a principality equivalent to the one he lost, nor did France in any other way try to fulfill the clause. The plate of the Church of St. John was inventoried at one million francs, and was used for the requirements of the garrison and for fitting out a warship. Of the 600,000 francs granted to Hompesch as an indemnity for his furniture or private effects—in which the church furniture might reasonably be included—300,000 were retained in discharge of his debts, notwithstanding that the “sum would be covered by sale of the lands belonging to the order in Malta, then in possession of the French.” One-third of the remaining 300,000 francs was paid to Hompesch in cash, and treasury drafts covered the remaining two-thirds. The French treasury refused to pay these drafts. The stipulation of an annual pension of 300,000 francs seems not to have been fulfilled.²¹

8. The question of Malta arose again at the negotiations for the Treaty of Amiens. At that time France proposed conditions which England refused to accept on the ground that they were contrary to the terms of Article IV of the preliminary treaty signed at London, October 1, 1801. This article provided:

The Island of Malta and its dependencies shall be evacuated by the troops of His Britannic Majesty, and restored to the Order of Saint John of Jerusalem.

For the purpose of rendering this island completely independent of either of the two contracting parties, it shall be placed under the guarantee and protection of a third Power, to be agreed upon in the definitive treaty.

The definitive treaty signed at Amiens on March 27, 1802, devotes Article X to Malta, its substantive provision being:

The Islands of Malta, Gozo and Comino shall be restored to the Order of Saint John of Jerusalem, and shall be held by it upon the same conditions on which the order held them previous to the war, and under the following stipulations.

The thirteen stipulations which follow provide that the Knights of Malta “whose Langues shall continue” are invited to return to

²¹ William Hardman, *A History of Malta*, 61, 77, 100; Jonquière *L'Expedition d'Egypte*, I, 640; Garden, *op. cit.*, VI, 46.

Malta and to choose a grand master; that there shall be no British nor French Langues; that the British forces shall evacuate the island within three months after the exchange of ratifications and the island be delivered up to the order, provided that a duly empowered grand master be upon the island to receive possession; that the independence of the islands and the present arrangement shall be under the protection and guarantee of Great Britain, France, Austria, Russia, Spain, and Prussia. Other stipulations do not now concern us.

Malta was not restored to the order by Great Britain, and the article remained unexecuted, this fact becoming the pretext of the war which lasted from 1803 to 1814. Great Britain based her eventual nonexecution of the article upon the failure of the stipulations to be realized, but many political considerations also affected her attitude. In a note of February 28, 1803, Lord Hawkesbury listed to Lord Whitworth, British Ambassador at Paris, the stipulations which had not been fulfilled as a condition precedent to evacuation. "These conditions," wrote Lord Hawkesbury to the French Ambassador at London on March 15, "must be considered all of equal effect; and if any material parts of them should have been found incapable of execution, or if the execution of them should for any circumstances have been retarded, His Majesty would be warranted in deferring the evacuation of the island until such time as the other conditions of the article could be effected, or until some new arrangement could be concluded which should be judged satisfactory by the contracting parties." The latter alternative was attempted, and Great Britain made proposals on April 23 and May 7, based on the British right to occupy Malta for ten years. France refused this proposal, and Lord Whitworth demanded his passports.²²

9. A decision rendered by M. Merlin, the French Minister of Justice, in the case of the *Juliane*, brought into Bordeaux, charged the competency of the executive power in the court of the Department of Gironde with establishing in its conclusion that the treaty of commerce concluded for fifteen years at Copenhagen between France and Denmark on August 28, 1742,²³ had ceased to exist in 1757. The jurists evi-

²² Handman, *A History of Malta*, 404, 433, 444, 447-448, 449, 453, 463, 466, 400, 472, 481.

²³ Text in Wenck, *Codex*, I, 591.

dently ignored the existence of the convention of September 30, 1749, which indefinitely extended the treaty of 1742. The decision cost the Danes more than 12,000,000 francs and deprived the French Directory of the confidence of neutrals.²⁴

10. A treaty of alliance was signed at Turin, April 5, 1797, between France and Sardinia, being confirmed at first by the French Executive Directory. Change in circumstances having decreased the importance of the assistance which the King of Sardinia was able to give, the treaty was neglected by the French to the point where it was regarded as null and therefore it was not presented to the legislative body for ratification. It was only on account of requests made by Sardinia that the treaty was ratified by the Council of 500 on October 22 and by the *Ancien Conseil* on November 1, 1797. To this delay in ratification must be credited the silence observed in regard to the King of Sardinia in the peace which France concluded during the interval with Austria at Campo Formio, for Article VIII of the Alliance of Turin bound France not to make any armistice or treaty of peace without Sardinia being included.²⁵

11. Article V, of the Convention of Constantinople of March 21, 1800, provided that during the present war

the Court of Russia and the Porte will be free to garrison the fortresses of the republic [of Ragusa], on the request, however, of the republic and after a reciprocal understanding between the two high contracting parties, or between the commandants of their naval forces.

The Porte accused Russia in a manifesto published on January 7, 1807, with having continually violated this article in having introduced into the Republic of Ragusa as many troops as it wished and in having disposed of the seven islands constituting the republic as its own property.²⁶

12. The question of whether an accord reached in conference, even if not incorporated in a treaty, can be violated was raised by Article VIII of the Peace of Lunéville of February 9, 1801, between Austria and the French Republic. This article provided that new

²⁴ Schoell, *op. cit.*, VI, 45; Garden, *ibid.*, VI, 307, 335-336.

²⁵ Schoell, *op. cit.*, V, 33; Garden, *op. cit.*, V, 403.

²⁶ Schoell, *op. cit.*, V, 318; Garden, *op. cit.*, VI, 220.

possessors of territory which changed hands²⁷ should be charged with the debts hypothecated on its soil, but it was expressly understood that the French Republic assumed only the debts resulting from loans formerly consented to by the states of the ceded territories or from expenses for their effective administration. This reasonable stipulation was contrary to one agreed to at the Congress of Rastadt, which did not result in a treaty. All of the territories ceded by the Peace of Lunéville were not countries with states, and consequently the loans hypothecated on them had not been established in the manner prescribed in the Peace of Lunéville. New negotiations were begun and at Ratisbon another attempt was made to establish the principle laid down at Rastadt.²⁸

13. By Article I of the Peace of Amiens of March 27, 1802, between France and Great Britain, it is agreed that there will be peace, amity, and friendship between Great Britain, on the one hand, the French Republic, Spain and the Batavian Republic (Netherlands), on the other. The condition is expressed according to the customary form, and it is promised to avoid everything which might bring injury to the contracting parties. The treaty had scarcely been signed when France complained that this promise had not been observed by England.²⁹

14. At Berlin on November 14, 1802, a treaty was signed by the Batavian Republic (Netherlands) and Prussia regulating the details of a cession of the enclaves of Sevenaer, Huyssen, and Malburg to the republic, which had been agreed upon by Article II of a treaty of the preceding May 24. This provision and the ancillary convention were never executed and the Dutch did not obtain possession of these three districts until after the Peace of Tilsit and as a result of the treaty at Fontainebleau of November 11, 1807.³⁰

15. The treaty of Fontainebleau was concluded on April 11, 1814, between the Emperor Napoleon and his allied conquerors, Austria, Prussia, and Russia. There is this peculiarity about it, that its victo-

²⁷ The territories affected were: former Belgian provinces, the county of Falkenstein, Frickthal, Austrian possessions on the left bank of the Rhine, Verona, Brisgau, Modena, and Elba.

²⁸ Schoell, *op. cit.*, V, 384; Garden, *op. cit.*, VI, 256-257.

²⁹ Schoell, *op. cit.*, VI, 146; Garden, *op. cit.*, VII, 37.

³⁰ Garden, *op. cit.*, VII, 144.

rious negotiators by it pledged the Government of France to various responsibilities toward the man they were packing off to Elba. When the Bourbon Louis XVIII came back to Paris to occupy the throne he found these engagements made for him:

Art. 1. His Majesty the Emperor Napoleon renounces for himself, his successors, and descendants, as well as for all the members of his family, all right of sovereignty and dominion, as well to the French Empire and the Kingdom of Italy, as over every other country.

Art. 3. The isle of Elba, adopted by his Majesty the Emperor Napoleon as the place of his residence, shall form, during his life, a separate principality, which shall be possessed by him, in full sovereignty and property; there shall be besides granted, in full property, to the Emperor Napoleon an annual revenue of two million francs, in rent-charge, in the great book of France, of which one million shall be in reversion for the Empress.

Art. 6. There shall be reserved in the territories hereby renounced, to his Majesty the Emperor Napoleon, for himself and his family, domains or rent-charges in the great book of France, producing a revenue, clear of all deductions and charges, of two million five hundred thousand francs. These domains and rents shall belong in full property, to be disposed of as they shall think fit, to the princes and princesses of his family.

D'Angeberg details ³¹ how these articles were not executed. It is sufficient to say that Napoleon in exile never received a sou of the 2,000,000 francs; and that the 2,500,000 francs for Napoleon's family were simply never paid. It was the failure of Louis XVIII to execute his share of these engagements that caused the presidents of the *Conseil d'Etat*, when called upon to consider the proclamation of the Congress of Vienna of March 13, 1815, against Napoleon, to authorize and legitimize his return.³² In truth, however, Napoleon was no martyr, though in this instance ill-treated. A furious declaration against him in Germany at the time charged him with "the violation of all the treaties he has signed, including that of Fontainebleau," ³³ and the rhetorical assertion was almost true.

³¹ *Le Congrès de Vienne*, 148 ff.

³² Correspondence of Prince Talleyrand and Louis XVIII, 340.

³³ *Ibid.*, 391.

(B) AFTER 1848.

16. On August 23, 1894, it was reported to the Department of State that two American citizens, J. S. Lampton and George B. Wiltbank, had been arrested at Bluefields, Nicaragua, during a rebellion, and that the Nicaraguan commander refused to release them on condition of their leaving the country. This action was protested by Secretary Gresham, who demanded an early and fair trial or the release of the prisoners. The demand was based on a clause in Article VII of the United States treaty with Nicaragua of June 21, 1867, as follows:

The citizens of the high contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in said countries, respectively, for the prosecution and defense of their just rights. . . .

Nicaragua maintained the right of expulsion without trial on the ground that the Americans were "compromised in the crimes of rebellion and sedition." Secretary Gresham replied that expulsion without trial would be in violation of the treaty of 1867, and eventually the order of expulsion was revoked "upon good behavior."⁴

17. On October 26, 1894, Minister Lewis Baker reported that the Bluff Improvement Land Company's property at Bluefields had been forcibly seized and occupied by Nicaragua. The company had complained to Secretary Gresham a month earlier. Nicaragua argued that under its constitution and international law "no foreigner can solicit the intervention of his government in defense of his rights or pretensions until after he has exhausted all remedies which the laws of the country in which he lives allow him." "But the treaty between the two countries," said the Secretary, "entitled American citizens whose property has been taken by Nicaragua for public purposes, 'without full and just compensation paid in advance,' to invoke in the first instance the diplomatic intervention of the United States in their behalf. The very act of the Government of Nicaragua in taking the property without full and just compensation paid in advance was a violation of the

⁴ For. Rel., 1894, App. I, 329-352; Moore, Digest of International Law, IV, 100.

treaty (sec. 3, Art. IX, treaty of 1867). No action of its courts (assuming them to have jurisdiction of such suits) can change the character of the act, or make it any the less a plain violation of the treaty.

"Should the courts decide in favor of the aggrieved parties and award them compensation, and that compensation be actually paid, the treaty would still remain violated, because the compensation was not paid in advance of the taking of the property. To claim that redress must be sought through the courts is to claim that payment of compensation may be postponed till the property has actually been taken, in face of the treaty which says that payment must be made in advance. One party to a treaty cannot thus practically change its terms and evade its requirements."³⁵

18. In Article XXIX of the United States treaty of June 18, 1858, with China it is provided that "hereafter those who quietly profess and teach these doctrines [the Christian religion] shall not be harassed or persecuted on account of their faith." Minister Charles Denby, in a dispatch to the Tsung-li Yamen on April 9, 1897, stated that at Lien Chou, Kwangtung, Chinese converts were not allowed to compete at the government examinations. While admitting that Christians had the right to enter the examinations, the magistrate of the prefecture said he could do nothing to compel the examiners to admit them. Year after year the viceroy had assured missionaries that Christians might compete. "I request you to issue stringent orders," wrote Mr. Denby, "that no Christian qualified to present himself at any examination shall be hindered or discriminated against because of his religious belief," basing the request on the violation of the treaty portion quoted. Secretary Sherman approved the representation and China issued the necessary orders.³⁶

19. Italy in declaring war on Turkey on September 29, 1911, furnished the most recent authentic example of treaty disregard not connected with the present world war. The Treaty of Paris of March 30, 1856, stipulates:

Art. VII. Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Austria, His

³⁵ Moore, Digest of International Law, V, 414.

³⁶ Moore, Digest, V, 459; For. Rel., 1897, 83-84.

Majesty the Emperor of the French, His Majesty the King of Prussia, His Majesty the Emperor of all the Russias, and His Majesty the King of Sardinia, declare the Sublime Porte admitted to participate in the advantages of the public law and system (*concert*) of Europe. Their Majesties engage, each on his part, to respect the independence and the territorial integrity of the Ottoman Empire; guarantee in common the strict observance of that engagement; and will, in consequence, consider any act tending to its violation as a question of general interest."

Exchange of ratifications on April 27, 1856, rendered this article effective. It is worth attention, for it is the formal admission of the first non-Christian and extra-European "Power into the charmed circle of the "family of nations." It is the guarantee engagement that here concerns us, for in 1878 it came into conflict with Russian claims resulting from war. The Treaty of San Stefano of March 3, 1878, disregarded the guarantee, and this provoked the Congress of Berlin and its treaty of July 13, which quite as thoroughly disregarded the guarantee, but legitimately because all parties to the original engagement participated in the act. Parts of the 1856 treaty had been abrogated and other parts revised by the Treaty of London of March 13, 1871, and that of Berlin wrought further changes, but Article 7 of 1856 was left unimpaired and was in force until Turkey entered the present European War. Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey were parties to the earliest of the series, Prussia being lineally succeeded by the German Empire, Sardinia by Italy at London in 1871, and Austria by Austria-Hungary in 1878. The treaty of Berlin provides:

Art. LXIII. The Treaty of Paris of March 30, 1856, as well as the Treaty of London of March 13, 1871, are maintained in all such of their provisions as are not abrogated or modified by the preceding stipulations.

On September 26, 1911, Italy sent to the Sublime Porte an ultimatum in which after general criticisms it was announced that the Italian Government "has decided to proceed to the military occupation of Tripoli and Cyrenaica," both indisputably Turkish territory. On September 29 Italy announced a state of war from 2 P.M., and the

" Sir Thomas Barclay, *The Turco-Italian War and Its Problems*, 130.

" The United States and Latin America are here considered of the European order.

transmission of this declaration seems to have been the first news other governments officially had of the course of events. On October 26, Reuter's reported an official Italian notification of "the cessation of Ottoman rule in North Africa," and in November a decree that "Tripolitana and Cyrenaica are placed under the full and complete sovereignty of the Kingdom of Italy" was issued, later being converted into law. This decree clearly disregarded Article 7 of the treaty of 1856, which has been shown to remain in vigor. Evidently no protest by other contractants was made, on the apparent conviction that as Italy had made war to take Tripoli and Cyrenaica, diplomacy would be ineffectual to combat the sovereign resort to force. It is interesting to note that the Treaty of Lausanne of October 18, 1912, confirming Italian sovereignty over the territories, in no way contemplated even notification to the Powers contracting in 1856.

DENYS P. MYERS.

THE AMERICAN ATTITUDE TOWARD CAPTURE AT SEA

THE United States, fighting a war for independence from the greatest of maritime Powers at a time when the belligerent and neutral worlds were united against England because of her maintenance of the ancient rules of maritime warfare, naturally incorporated into its first treaty, the commercial agreement of 1778 with France, the "twin maxims" of Utrecht: free ships, free goods, enemy ships, enemy goods.¹ The greater freedom which the first of these principles expressed agreed with the interests and the temper of the new republic, since in but one of its subsequent treaties has it included the opposing regulations upheld by the mother country.² Treaties of 1782 with the United Provinces,³ 1783 with Sweden,⁴ and 1800 with France⁵ stipulated that free ships should make free goods and enemy ships, enemy goods.

Before the last date the United States had made treaties in which the first of the "new" rules, namely, that free ships make free goods, stood alongside of the second "English" rule which provided that neutral goods in enemy vessels should be free from capture. This is true of the treaties of 1787 with Morocco,⁶ of 1795 with Spain,⁷ of 1796 with Tripoli,⁸ and of 1797 with Tunis.⁹ It would, therefore, have been impossible to say of the period after 1780 what a defender of England's position towards the Armed Neutrality has written of the preceding period. Manning, speaking of the absence from the manifesto of the Northern Confederacy of the second principle of the "Dutch system," said: "But never had there been, among Christian Powers, a treaty which

¹ Martens, *Recueil de Traités*, II, pp. 594, 597.

² England, since the early part of the seventeenth century, had upheld the principles of the *Consolato del Mare*, which exempted neutral goods from capture on enemy ships, but permitted the capture of enemy goods wherever found. These principles were incorporated into the Jay Treaty.

³ Martens, *Rec.*, III, p. 439.

⁴ *Ibid.*, VII, p. 103.

⁵ *Ibid.*, VI, p. 143.

⁶ *Ibid.*, p. 406.

⁷ *Ibid.*, pp. 568, 572.

⁸ *Ibid.*, IV, p. 247.

⁹ *Ibid.*, p. 298.

conveyed the former immunity without also engaging the latter privilege." ¹⁰

It has already been noted that this country did not make it a *sine qua non* of its agreements upon the question of neutral rights at sea that they be guaranteed unconditionally. Professor Moore cites but five treaties in addition to the four above mentioned in which the United States followed out the program of the league of the northern neutrality and set precedents for the practice in the Crimean War: those of 1785 with Prussia,¹¹ 1805 with Tripoli,¹² 1816 with Algiers,¹³ 1828 with Prussia,¹⁴ and 1836 with Morocco.¹⁵ In 1860 the same provisions appeared in a treaty with Venezuela.¹⁶

The treaty of 1785 with Prussia contained the following article:

"If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other. . . ."¹⁷

Benjamin Franklin had tried in vain two years earlier to have the principle of complete immunity embodied in the treaty with Great Britain. As Bentwich says, he was the "originator of the movement in practical politics."¹⁸ He represented a new nation with a small navy and unlimited commercial potentialities. In 1785 he was negotiating with Frederick the Great, who derived satisfaction from being regarded as a reformer so long as the reputation cost him nothing. Article XII of

¹⁰ The Law of Nations, p. 335.

¹¹ Martens, *Rec.*, IV, p. 42.

¹² Malloy, *Treaties between the United States and other Powers* (Washington, 1910), II, p. 1788.

¹³ Martens, *Nouveau Recueil*, V, Supplement, p. 6.

¹⁴ *Ibid.*, VII, 2, p. 615.

¹⁵ *Ibid.*, XIII, p. 685; see J. B. Moore, *Digest of International Law* (Washington, 1906), 7, p. 435.

¹⁶ Malloy, II, p. 1845.

¹⁷ Martens, *Rec.*, IV, p. 42.

¹⁸ *War and Private Property* (London, 1907), p. 85.

the treaty above quoted placed it in the small class of treaties signed up to that time which exhibited special consideration for neutral rights. Article XXIII, however, is the one which makes the treaty unique; it reads: If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance. . . . And all merchant and trading vessels employed in exchanging the products of different places and thereby rendering the necessities, conveniences, and comforts of human life more easy to be attained and more general shall be allowed to pass free and unmolested; . . .¹⁰

The treaty of 1785 expired by its own limitations in October, 1796. Three years later Prussia and the United States entered into a second treaty, Article XII of which reads:

Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the last two wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves or jointly with other Powers alike interested, to concert with the great maritime Powers of Europe such arrangements and such permanent principles as may serve to consolidate the liberty and safety of the neutral navigation and commerce in future wars. And if in the interval either of the contracting parties should be engaged in a war to which the other should remain neutral, the ships of war and privateers of the belligerent Power shall conduct themselves toward the merchant vessels of the neutral Power as favorably as the course of the war then existing may permit, observing the principles and rules of the law of nations generally acknowledged.¹¹

Article XXIII remained as in the treaty of 1785 only as far as the section providing for complete immunity, which was excluded in its entirety.¹²

¹⁰ Martens, *Rec.*, IV, p. 47. (Italics by the writer.)

¹¹ *Ibid.*, VI, pp. 676-8. This latter section appears to permit of action under the "English rules" or even of the extreme practice to which the application of the rule of hostile infection (enemy ships, enemy goods; enemy goods, enemy ships) led.

¹² *Ibid.*, pp. 686-8. This fact Oppenheim overlooks when he corrects Perels and declares that Article XII of the treaty of 1828 expressly adopts the immunity of private property by renewing the twenty-third article of the treaty of 1799. See his *International Law*, II, p. 221, note 2. Westlake has a similar misstatement, — *International Law*, II, p. 129.

To complete the survey of the three treaties with Prussia it is necessary to quote from that of 1828. Article XII therein provides:

The twelfth article of the treaty of amity and commerce concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to treaties with Great Britain, are hereby revived with the same force and virtue as if they made part of the context of the present treaty.²²

This provision, therefore, includes Article XIII of the treaty of 1799, repeated from that of 1785, stipulating that contraband shall not be confiscable upon the ships of either party, but shall be subject to requisition. It leaves the neutral flag inviolable even for the carriage of contraband, thereby going a step beyond the future Declaration of Paris, but it does not revive the immunity of enemy property provided for by the treaty of 1785.

Under pressure the United States plenipotentiary agreed to Article XVII of the treaty with England of 1794, by which "if any property of an enemy should be found on board of such vessel [of the other party being neutral], that part only which belongs to the enemy shall be made prize, and the vessel shall be at liberty to proceed with the remainder without any impediment."²³ This article expired October 28, 1807,²⁴ and it has not been renewed; neither do provisions concerning this question appear in any subsequent treaties of the United States with Great Britain.

Not only, however, has the United States partially sacrificed its doctrine of immunity by consenting to numerous treaties which permit the capture of neutral property in the ships of enemies;²⁵ but it has introduced into a number of treaties the principle of reciprocity according

²² Martens, *N. R.*, VII, 2, pp. 619-620. For a convenient source, containing the three treaties in English, see Malloy, *Treaties, etc.*, II, pp. 1477-1501; also Niemeyer, *Urkundenbuch zum Seekriegsrecht* (Berlin, 1913), I, pp. 22-34.

²³ Martens, *Rec.*, V, p. 672.

²⁴ Malloy, I, p. 601, note A.

²⁵ For list of United States treaties containing the so-called Dutch principles, see Moore, *Digest*, VII, p. 436; also in Hall, *International Law*, 6th ed., p. 693, note. Hall is in error in including our treaty of 1854 with Russia; see Malloy, II, p. 1520.

to which free ships are to mean free goods only in cases where the enemy grants the same privilege to neutrals. The treaty with Spain of 1819 contains an article to that effect. It reads:

With respect to the 15th article of the same treaty of friendship, limits, and navigation of 1795, in which it is stipulated that the flag shall cover the property, the two high contracting parties agree that this shall be so understood with respect to those Powers who recognize this principle; but if either of the two contracting parties shall be at war with a third party, and the other neutral, the flag of the neutral shall cover the property of enemies whose government acknowledge this principle, and not of others.²⁰

The same provision occurs in the treaty with Colombia of 1824,²¹ in that with Central America of 1825,²² and in other treaties as late as that of 1871 with Italy,²³ and that of 1887 with Peru.²⁴ The reciprocity provision occurs both in treaties which confer immunity upon neutral property in enemy ships and in treaties which permit its capture and condemnation. In six treaties of the United States: those with Russia of 1854;²⁵ the Two Sicilies, 1855;²⁶ Peru, 1856;²⁷ Bolivia, 1858;²⁸ Hayti, 1864;²⁹ and the Dominican Republic, 1867,³⁰ reciprocity is demanded, but in milder terms. The treaty of 1854 with Russia by Article III provides:

²⁰ Martens, *Rec.*, Supp., IX, Pt. 1, p. 343; Malloy, II, p. 1656. Professor Moore states that a similar stipulation existed in the treaty with France of 1778. Digest, VII, p. 436. The writer is unable to discover such a stipulation in the treaty. Article XXIII provided: "It shall be lawful for all and singular the subjects of the Most Christian King, and the citizens, people, and inhabitants of the said United States, to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandizes laden thereon, from any port to the places of those who now are or hereafter shall be at enmity with the Most Christian King or the United States. . . . And it is hereby stipulated that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either, contraband goods being always excepted." See Martens, *Rec.*, II, p. 597.

²¹ Martens, *N. R.*, Supp., X, 2, p. 994.

²² *Ibid.*, *Nouveau Recueil Général*, I, p. 57.

²³ *Ibid.*, XVI, 1, p. 572.

²⁴ *Ibid.*, XVII, 1, p. 191.

²⁵ *Ibid.*, p. 926.

²⁶ *Ibid.*, p. 832.

²⁷ *Ibid.*, XXII, p. 63.

²⁸ *Ibid.*, p. 570.

²⁹ Malloy, I, p. 114.

³⁰ *Ibid.*, p. 408.

It is agreed by the high contracting parties that all nations which shall or may consent to accede to the rules of the first article of this convention [that free ships make free goods], by a formal declaration stipulating to observe them, shall enjoy the rights resulting from such accession as they shall be enjoyed and observed by the two Powers signing this convention.

Article XIX of the treaty of 1864 with Hayti engages the contracting parties "to apply these principles to the commerce and navigation of all such Powers and States as shall consent to adopt them as permanent and immutable." The same provision occurs in the treaty with the Dominican Republic, 1867, Article XV.

Secretary of State Madison declared the position of the United States to Mr. Armstrong, Minister to France, on March 14, 1806:

The United States cannot, with the same consistency as some other nations, maintain the principle [that free ships make free goods] as already a part of the law of nations, having on one occasion admitted and on another stipulated the contrary. They have, however, invariably maintained the utility of the principle, and whilst as a pacific and commercial nation they have as great an interest in the due establishment of it as any nation whatever, they may with perfect consistency promote such an extension of neutral rights.³⁷

His references are undoubtedly to the treaties of 1799 with Prussia and of 1794 with Great Britain.

The reply of Mr. Jefferson, when Secretary of State, to M. Genet, July 24, 1793, which has become a classic for the expression of the American view, is but one of a large number of declarations by American officials, judges, and publicists³⁸ which agree in supporting the *Consolato del Mare* as the common law on the subject of capture, to be observed invariably in the absence of treaty stipulations in a contrary sense:

³⁷ MS. Inst. U. S. Ministers, VI, p. 322; Moore, Digest, VII, p. 440. It may be doubted whether Madison could have named a single state whose practice over a considerable period of time justified its maintenance of the principle as a rule of law.

³⁸ E.g., James Kent, Commentaries on American Law, 8th ed. (New York, 1854) I, p. 126: "But neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel, beyond the limits of the neutral jurisdiction. This is a clear and well settled principle of the law of nations." See also Marshall's opinion, *The Nereide*, 9 Cranch, 388; Scott, Cases, p. 885.

I believe it cannot be doubted, but that, by the general law of nations the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. Upon this principle, I presume, the British armed vessels have taken the property of French citizens found in our vessels, in the cases above mentioned, and I confess I should be at a loss on what principle to reclaim it. It is true that sundry nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretense of having enemy goods on board, have, in many instances, introduced, by their special treaties, another principle between them, that enemy bottoms shall make enemy goods and friendly bottoms friendly goods—a principle much less embarrassing to commerce and equal to all parties in point of gain and loss; but this is altogether the effect of particular treaty, controlling, in special cases, the general principle of the law of nations, and, therefore, taking effect between such nations only as have so agreed to control it.³⁹

It may be remarked that the United States was at this time a neutral. To emphasize the adherence of the United States to the common law when itself at war and overlook its admission of the same principles when neutral would be unscientific. Continuously following the practice of older nations in its wars, the United States has as consistently maintained the value of a free neutral flag. Changing circumstances have not altered the tone of official directions to representatives abroad. In 1816 Secretary of State Monroe maintained the desirability of obtaining a treaty with England which should protect enemy goods in United States bottoms from capture, although "the importance of this rule is much diminished to the United States by their growth as a maritime Power, and the capacity and practice of their merchants to become the owners of the merchandise carried in our vessels." He based his opinion upon the fact that the newer rule "would prevent vexatious seizures by belligerent cruisers, and unjust condemnations by their tribunals from which the United States have sustained such heavy losses."⁴⁰

It has already been said that in ten of its treaties the United States has stipulated unconditionally for the rule free ships, free goods, while in

³⁹ American State Papers, For. Rel., I, pp. 166-167.

⁴⁰ Monroe to Adams, May 21, 1816, MS. Inst. U. S. Ministers, VIII, p. 61; Moore, Digest, VII, p. 441.

others it has agreed to the accompanying enemy ships, enemy goods. Chief Justice Marshall, in the case of the *Nereide*, took note of this fact after he had summarized a similar situation in the treaties of foreign states:

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods, and that friendly goods shall be safe in the bottom of an enemy. It is, therefore, clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation and they have sometimes stipulated for the one without the other.⁴¹

The opinion in this case, original with Marshall, is evidence that if American courts followed English decisions in the absence of treaty clauses, they were quite as careful to take full account of such clauses where they existed.

In 1823, the year in which France, intervening in Spain, temporarily dispensed with the right of capture at sea, President Monroe, through Secretary of State Adams, instructed American representatives in Europe to urge the abolition of capture upon the governments to which they were respectively accredited. France was inclined to accede to the proposition and Russia expressed sympathy toward it. Great Britain refused to entertain or discuss the proposal, which accordingly fell to the ground.

⁴¹ 9 Cranch, 388 ff., Scott, Cases, p. 887. Marshall in the same case holds that neutral property otherwise immune from capture is not rendered confiscable by the fact that the merchant vessel transporting it is armed: "It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a dictum should be found in the books pointing to such construction." He based his opinion upon the right of a neutral to transport his goods in the ship of a friend and refused to admit that the "differences in the degree of capacity" of the carrier to avoid capture and to prevent search could be regarded as restricting the complete right of the neutral. His opinion received confirmation in the case of the *Atalanta* (1818), 3 Wheat., 409. It disagreed with that in the English case of the *Fanny*, 1 Dodson, 443.

In 1826, in the instructions to the delegates from the United States to the Panama Congress, Secretary of State Henry Clay pointed out that though motives of self-interest had grown less important, this government still maintained its attitude looking toward freeing private property from the danger of capture at sea, as it had already been freed on land.⁴³

President Pierce took immediate advantage of the Franco-British agreement of 1854 to send identic propositions to the governments of Europe and America for conventions which should incorporate the principles of immunity for neutral goods on enemy vessels and of enemy goods on neutral vessels.⁴⁴

The United States had not, however, considered it possible to separate the two questions of privateering and capture in 1785 nor in 1823 and it acted consistently with its previous attitude in its refusal to accept the abolition of privateering so long as the property of its citizens in time of war should remain liable to confiscation. The United States was in the embarrassing situation of being unable to adhere to the rules which it had urged upon other governments. President Pierce had pointed out in his annual message in 1854 the danger that would attend a renunciation of privateering by a Power with a large mercantile fleet and a small navy.⁴⁵ The arguments and the facts were elaborated by Secretary of State Marcy on July 28, 1856, in a communication to Count Sartiges, the French Minister at Washington, who had extended an invitation to this government to adhere to the Declaration. In his reply Secretary Marcy offered to do so if the first article of the Declaration should be amplified so as to provide that "the private property of subjects or citizens of any one of the belligerent Powers shall not be subject to seizure by the vessels of the other unless it consist of contraband of war."⁴⁶ Russia promised to support this proposal if it should become "the subject of deliberation in common among the Powers";⁴⁶ France, Prussia, Holland, and Sardinia were inclined to

⁴³ C. H. Butler, "Immunity of Private Property," Report of 18th Conference of the International Law Association (London, 1900).

⁴⁴ Richardson, Messages, V, p. 275.

⁴⁵ *Ibid.*, p. 276.

⁴⁶ British and Foreign State Papers, 55, pp. 589-599.

⁴⁶ MS. Inst. Prussia, XIV, p. 239; Moore, Digest, VII, p. 566.

favor it;⁴⁷ the opposition of the British Government prevented a reply from that country until, upon the accession of Buchanan to the presidency, negotiations were ordered suspended, and they were not resumed during his term of office.⁴⁸ Yet in 1858 the treaty of the United States with Bolivia was so framed as to admit of a later amendment abolishing the right of capture.⁴⁹ And in 1859 the Department of State announced to the great Powers that:

With respect to the protection of the vessel and cargo by the flag which waves over them, the United States look upon that principle as established, and they maintain that belligerent property on board a neutral ship is not liable to capture; and from existing indications they hope to receive the general concurrence of all commercial Powers in this position. . . . It is not necessary that a neutral Power should have announced its adherence to this declaration in order to entitle its vessels to the immunity promised. Because the privilege of being protected is guaranteed to belligerents, co-parties to that memorable act, and protects their property from capture wherever it is found on board a vessel not engaged in hostilities . . . such an immunity withheld from this country would in fact operate as a premium, granted to other nations, and would be almost destructive of that important branch of our national industry, the carrying trade.⁵⁰

On April 24, 1861, Secretary Seward sent to the ministers of the United States in Great Britain, France, Russia, Prussia, Austria, Belgium, Italy, Denmark, and Holland drafts of conventions according to the terms of which this government would consent to adhere to the Declaration of Paris.⁵¹ The accompanying notes stated that: "the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals, not contraband, should be exempt from seizure and confiscation by national vessels in maritime war." But as "Europe seems once more to be on the verge of quite general wars," and as "a portion of the American people have raised

⁴⁷ MS. Inst. Portugal, XIV, p. 185; Moore, Digest, VII, p. 567. For replies to Marcy's proposal and general discussion of the effect it produced in foreign countries, see Niemeyer, *Urkundenbuch*, I, pp. 69-121.

⁴⁸ MS. Inst. Great Britain, XVII, p. 71; Moore, Digest, VII, p. 567.

⁴⁹ Malloy, I, p. 114.

⁵⁰ MS. Inst. France, XV, 455; Moore, Digest, VII, p. 450.

⁵¹ Moore, Digest, VII, pp. 570-573.

the standard of insurrection and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States, prudence and humanity combine in persuading the President, under the circumstances, that it is wise to secure the lesser good offered by the Paris Congress, without waiting indefinitely in hope to attain the greater one. . . ."

President Lincoln's proffer of adherence was prompted by his desire that foreign Powers should treat the Confederate privateers as pirate ships. When Great Britain and France recognized the "insurgents" as "belligerents," and declared that it would be essential to introduce into their conventions with the United States a declaration of non-intention to become implicated in the internal conflict in the latter country, Secretary Seward terminated negotiations, expressing the hope that within the near future they might be reopened with increased prospect of success.⁵² Six years later as circumstances were adjudged unfavorable, the same Secretary of State declined to submit the Marcy amendment to the consideration of the Powers, though urged to do so by the Italian Government.⁵³

In the War of 1812 there was no accepted rule among the nations which protected neutral property in enemy ships, so that the instructions of the United States Government to its naval officers to destroy enemy merchant vessels could be carried into effect without placing the government under obligation to pay large indemnities, and without an evasion of the rule above mentioned. In the War of the Rebellion, Confederate armed vessels were careful to respect the ships of neutrals, but they sank and burned the ships of enemies without scruple. The practice of the Southern Confederacy showed it to be undeniable that the power to destroy the vessels of enemies before adjudication in a court of prize was extremely dangerous, in view of the latitude within which a belligerent could interpret "necessity."

⁵² For the negotiations of the United States concerning the Declaration of Paris, see Moore, Digest, VII, pp. 561-583. Mr. Seward interpreted the proposed qualifying declaration to mean that the Powers "should be at liberty to recognise the United States rebels as a maritime Power equal under the Treaty of Paris to the United States themselves." MS. notes to Italy, VI, p. 344, 1867; Moore, Digest, VII, p. 467.

⁵³ MS. Inst. Prussia, XIV, p. 504; Moore, Digest, VII, p. 467.

The United States Government was not bound in the Civil War to observe the Declaration of Paris. The goods of enemies in neutral vessels might therefore have been captured and confiscated without necessity for the development of the doctrine of continuous voyage, which had been applied to a slight extent in the Crimean War. The Government of the United States chose, however, to observe the Declaration.⁵⁴

The cases of the *Bermuda*,⁵⁵ the *Stephen Hart*,⁵⁶ the *Springbok*,⁵⁷ and the *Peterhoff*,⁵⁸ are familiar to all students of the history of the doctrine of continuous voyage. Chief Justice Chase handed down the decisions in the first two cases together. The cargoes of both were condemned in their entirety, part as being contraband ostensibly destined to neutral ports, but actually intended for belligerent ports, the remainder as being consigned to the same persons as were the real consignees of the contraband goods. The ships were also condemned on the ground that the contraband shipment was made with the consent of the owners, given in fraud of belligerent rights.

The cargo of the *Springbok* was condemned for attempt to run the blockade, the court through the Chief Justice declaring its belief that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely than the *Springbok* to succeed in reaching safely a blockaded port, holding that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."⁵⁹ The ship was released as having been engaged in a *bona fide* voyage to the port of Nassau. It is of great interest to note that in this case the court clearly laid down the application of the continuous voyage doctrine to any sorts of cargoes when their ultimate destination was a blockaded port. Although the Chief Justice takes note of the fact that only a small part of the cargo is absolute contraband, he immediately says:

But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we

⁵⁴ Moore, Digest, pp. 570-574.

⁵⁵ *Ibid.*, pp. 559-560.

⁵⁶ *Ibid.*, pp. 28-62.

⁵⁷ Wallace, III, pp. 514-559.

⁵⁸ *Ibid.*, V, pp. 1-28.

⁵⁹ *Ibid.*, V, p. 28.

repeat, contraband or not, it could not be condemned if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.⁸⁰

The *Peterhoff* case resembled the cases above discussed in that the vessel was neutral and was carrying a mixed cargo of contraband and noncontraband goods between neutral ports under circumstances which indicated that at least the contraband was intended to reach persons within the Confederacy. It differed from those cases in that the second part of the transport was to be accomplished overland. Instead of transshipping the cargo at some West Indian port, thence to take the chance of capture in attempting to run the blockade of the Southern ports, the consignors intended to unload it at the Mexican port of Matamoras, across the Rio Grande from Brownsville in Texas.

The Chief Justice condemned the contraband goods and those which belonged to the owner of the contraband. The ship and the remainder of the cargo were released. The court pointed out that the Rio Grande was a boundary river, preserved by treaty from blockade. Hence "neutral commerce with Matamoras, except in contraband, was entirely free."⁸¹ As Brownsville lies farther up the river than the blockading vessels [could] navigate, the question before the court narrowed down to this: Did "an ulterior destination to the rebel region which we now assume as proved [affect] the [neutral] cargo of the *Peterhoff* with liability to condemnation"?⁸²

The answer of the court was an emphatic negative. The principles laid down in the *Bermuda* and similar cases were reaffirmed, but by reference to precedent in the cases of the *Stert*,⁸³ the *Ocean*,⁸⁴ and the *Jonge Pieter*,⁸⁵ the "lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation" was established.⁸⁶ This portion of the opinion is of practical value to those who are to-day studying the embargo which Great Britain has placed over all sorts of goods entering neutral ports near to Germany, when the goods

⁸⁰ Wallace, V, p. 26.

⁸¹ *Ibid.*

⁸² *Ibid.*, III, p. 297.

⁸³ *Ibid.*, p. 51.

⁸⁴ Robinson, IV, p. 65.

⁸⁵ *Ibid.*, IV, p. 79.

⁸⁶ Wallace, V, p. 56.

cannot be proved to be for consumption within the neutral countries. The learned Chief Justice said:

Trade with a neutral port in immediate proximity to the territory of one belligerent is certainly very inconvenient to the other. Such a trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence.⁶⁷

On another page these "lessons" are thus summarized:

. . . Contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras, and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras.⁶⁸

These four decisions may be thus epitomized: Noncontraband goods being transported in neutral ships toward neutral ports may be captured and confiscated if their ultimate destination may be presumed to be a blockaded port; such goods may not be confiscated when the continuance of the voyage is to be inland. The Supreme Court advanced a considerable distance toward the abrogation of the rule of free ships, free goods, but it did not go the whole way.

The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from seizure, on the high seas or elsewhere, by the armed vessels or

⁶⁷ Wallace, V, p. 57.

⁶⁸ *Ibid.*, p. 59.

by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party.⁶⁶

This article of the treaty between the United States and Italy of February 26, 1871, marks it as the only international agreement now in effect that provides for complete immunity of non-offending private property. It is the logical result of the identical tendencies of the two countries in this respect, but its importance can hardly become great in practice. Its significance lies in its attestation that the principle it embodies is worthy of a place in the agreements of two important Powers.

In 1880 Secretary of State Evarts notified the Government of Peru, at war with Chile, that the treaty of 1870 which provided for the freedom of the neutral flag covered the cases which Peru was threatening to exempt from its operation.⁶⁷ Chile was exporting cargoes of nitrate from a section of the Peruvian coast which she had occupied and which Peru refused to regard as beyond her jurisdiction. Mr. Evarts declined to admit the possibility of legal seizures of American vessels carrying such nitrate.

In the recent war with Spain we necessarily enforced the rule of capture, as there was no response to our proclamation that we would not resort to privateering; and, as the implied retention of that right by Spain rendered our commerce subject to capture, we were bound to reserve and exercise every right of war as against our enemies.⁶⁸

Spain, however, failed to make any captures of American merchantmen, and it would seem that the United States allowed to pass an excellent opportunity for putting into operation the liberal doctrine it has been urging for more than a century.⁶⁹

On April 26, 1898, President McKinley declared that the neutral flag should cover enemy goods not contraband, and that neutral goods,

⁶⁶ Martens, *N. R. G.*, I, p. 57.

⁶⁷ *Ibid.*, p. 97.

⁶⁸ C. H. Butler, "Freedom from Capture of Private Property at Sea," *North American Review*, 168, 1899, p. 57.

⁶⁹ Two considerations hindered such action: (1) the comparative weakness of the Spanish navy was not realized; and (2) no preliminary arrangement had been effected regarding prize money.

except contraband, should not be liable to confiscation under the enemy's flag.⁷³ Three days earlier Queen Marie Christina issued a decree, Article III of which read:

Notwithstanding that Spain is not bound by the declaration signed in Paris on the 16th of April, 1856, as she expressly stated her wish not to adhere to it, my government, guided by the principles of international law, intends to observe and hereby orders that the following regulations for maritime law be observed:

(a) A neutral flag covers the enemy's goods except contraband of war.

(b) Neutral goods, except contraband of war, are not liable to confiscation under the enemy's flag.⁷⁴

The peculiar situation of war between the two more important of the three Powers that had not signed the Declaration of Paris provided an opportunity for demonstrating the attitude of both Powers to the four rules of the Declaration.⁷⁵ The action of Spain and the United States afforded striking evidence in support of the legal character of those famous rules.

The important cases in American prize courts arising out of this war involved the question of blockade.⁷⁶ The case of the *Carlos F. Roses* involved the determination of the enemy or neutral character of the cargo of a Spanish vessel, the court basing its decision upon the President's proclamation.⁷⁷ In the case of the Spanish steamer *Rita*, condemned as enemy property, the court referred to the efforts of the American Government toward a milder treatment of privately owned ships and cargoes.⁷⁸

Article IV of the President's proclamation already cited extended to Spanish vessels in American ports a thirty-day period for loading and departing, and guaranteed immunity from capture if such ships were

⁷³ Foreign Relations of the United States, 1898, p. 772.

⁷⁴ *Ibid.*, p. 774.

⁷⁵ Spain and Mexico definitively adhered to the Declaration of Paris in 1908 and 1909 respectively; see Holland, *Letters on War and Neutrality*, p. 65.

⁷⁶ E. J. Benton, *International Law and Diplomacy of the Spanish-American War* (Baltimore, 1908), p. 178, notes that three Spanish merchantmen were destroyed by a cruiser of the United States, but that the destruction was justified by the authorities on the grounds that the ships were transports.

⁷⁷ 177 U. S. 655; Scott, *Cases*, p. 637.

⁷⁸ Moore, *Digest*, VII, p. 470.

able to furnish the proper papers. The Spanish decree afforded but five days and did not specify for safety from capture of vessels leaving within that time and met on the high seas. And whereas this government guaranteed immunity to Spanish merchant vessels which, prior to April 21, 1898, had sailed from any foreign port bound for any port or place in the United States, the immunity to operate not only while such vessels were proceeding toward and discharging cargo in such port or place, but also while they were proceeding toward any unblockaded port, after leaving the port of discharge, Spain made no mention of similar action toward the vessels of this country.⁷⁹

In his annual message, December, 1898, President McKinley asked for authority "to correspond with the governments of the principal maritime Powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent Powers."⁸⁰ In spite of our rapid conquest of the seas, American commerce had lost heavily through the rise of insurance rates. "... One well known shipping firm in New York City paid during the brief period of war over sixty thousand dollars in war premiums, and the aggregate amount of such premiums, according to shippers well informed as to the actual facts, far exceeded the value of all the Spanish merchantmen captured by our Navy under the general rules of maritime warfare."⁸¹ As the major portion of the enlarged premiums was paid to foreign firms, the President had good foundation for his statement that: "The experience of the last year brings forcibly home to us a sense of the burdens and waste of war." Congress did not take final action upon resolutions of both houses in the sense urged by the President's message, but it removed an important obstacle to later freedom of action by abolishing prize money, a step which the Navy did not hinder.⁸²

⁷⁹ The American proclamation did not provide for the loading of such vessels nor for immunity for Spanish vessels which were proceeding toward neutral ports, having begun their voyages prior to April 21, 1898. See the case of the *Buena Ventura*, 175 U. S. 384.

⁸⁰ Senate Journal, 55th Congress, 3d Session, p. 4 ff.

⁸¹ Butler, "Freedom from Capture," etc., N. A. R., 168, 1899, p. 55.

⁸² U. S. Statutes at Large, 55th Congress, 30, c. 413, p. 1007.

The attitude of Congress encouraged President McKinley and Secretary Hay to instruct our representatives to the First Hague Conference to lay before that body the claims of the principle of immunity. There, as the subject was not upon the program of the Conference, the efforts of the American delegation, headed by Honorable Andrew D. White, succeeded only to the extent that the Conference listened to the memorial and expressed the wish that the question be referred to a subsequent conference for consideration.⁸³

In 1903 President Roosevelt in his annual message advocated the immunity of non-offending private property at sea as a measure necessary to bring maritime warfare to the standard of humanity practiced in war on land. Congress accordingly, by joint-resolution, declared it to be "desirable in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime Powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."⁸⁴

At the Second Hague Conference this government crowned its continuous record of agitation for immunity by instructing its delegates to submit the question to the Conference.⁸⁵ The Russian program of April 13, 1906, included the subject.⁸⁶ The consideration of the reform was initiated on June 28, 1907, by an address of Mr. Joseph H. Choate, in which the record of international theory and practice in the preceding century was outlined and discussed.⁸⁷ The proposition of the United States, the most sweeping of the ten offered to the Conference, was:

The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels

⁸³ Foreign Relations, 1899, pp. 511-520; J. B. Scott, *Hague Peace Conferences* (Baltimore, 1909), I, pp. 65, 699-700; II, pp. 9, 24, 71, 79; *La Conférence Internationale de la Paix* (The Hague, 1899), pt. I, pp. 31-33.

⁸⁴ Congressional Record, 58th Cong., 2d Sess., Apr. 28, 1904, p. 58.

⁸⁵ Scott, H. P. C., II, pp. 192-194.

⁸⁶ *Ibid.*, pp. 176-177.

⁸⁷ *La Deuxième Conférence Internationale de la Paix* (The Hague, 1907), Actes et Documents, III, pp. 776-779.

or by the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers.

The delegations of Austria-Hungary, Brazil, China, Italy, Norway, and Sweden expressed adherence to the American proposal. Those of Germany, Portugal, and Russia expressed the desire to see a concurrent determination of the questions of contraband and blockade. Great Britain's delegates declined to consider immunity unless a general agreement to respect private property would lead to a reduction of armaments. Argentina and Colombia desired to see capture maintained. When the vote was taken eleven states of the forty-four did not respond; twenty-one declared for, eleven against the proposition; while one state abstained from voting. The commission, therefore, was unable to present it as a convention for the consideration of the Conference.²²

The record of fact is distinctly creditable to the United States. Compelled by circumstances beyond its control to act upon the ancient rules of prize, it has stood alone amongst governments in making it a feature of its policy in all the changing conditions of its commercial and naval power to urge upon other states the complete exemption of private property from capture at sea, always excepting cases of contraband and blockade. It has consistently evidenced its belief that the logical consequence of the limitations already imposed upon the right of capture is the complete immunity of all private property from capture.

HAROLD SCOTT QUIGLEY.

²² *La Deuxième Conférence Internationale de la Paix* (The Hague, 1907), *Actes et Documents*, I, pp. 245-250.

EDITORIAL COMMENT

THE INTERNATIONAL RELATIONS OF JAPAN, CHINA, AND THE UNITED STATES

Viscount Ishii, Chairman of the Japanese Commission to the United States, in his address at the banquet given in honor of the commission in New York on September 29, 1917,¹ not only delivered an address admirable in form and substance, as was to be expected from the representative of Japan, but he took the American people into his confidence, stating that for equal opportunity in China the door must be open, that the door to China is the Pacific, and that Japan and the United States must see to it that this vast highway be open and be guarded by them to all who seek to enter on equal terms the China of to-day and of the future.

In the course of the address he first spoke of the interest that Japan has in law and order in China, an interest hardly second to that of the Chinese, and stated, on behalf of his country, that Japan, far from attempting to undermine the independence and integrity of China, was prepared to maintain them against any aggressor. On this point, he said:

Gentlemen, I assure you that a closed door in China has never been and never will be the policy of my government. The door is open, the field is there. We welcome coöperation and competition all tending to the betterment of the equal opportunity. . . . Much has been written about Japan's policy toward China as being one that sought only the aggrandizement of Japan and the confusion, disruption or oppression of our neighbor. Here again let me reassure you. The policy of Japan with regard to China has always been the same. We want good government, which means peace, security, and development of opportunity in China.

The distinguished representative of Japan paused, as it were, in the course of his address, to state why tranquillity in China was of such importance to Japan, and he put it upon solid ground when he said, as he immediately did:

The slightest disturbance in China immediately reacts upon Japan. Our trade there is large and increasing; it is valuable to us, and China is our friendly neighbor, with vast and increasing potentialities for trade.

¹ *New York Times*, September 30, 1917.

The speaker well knows, and he was well within his rights to state, that equal opportunity for all is really consistent with a special interest and a special advantage to Japan, for Japan is anchored, as it were, off the coast of China. The speaker also referred to the special rights in the territory of China possessed by his country, due in part to geography and to reasons with which he supposed his hearers to be familiar.

Circumstances for which we were in no sense responsible gave us certain rights on Chinese territory, but at no time in the past and at no time in the future do we or will we seek to take territory from China or to deprive China of her rights. We wish to be and always to continue to be the sincere friend and helper of our neighbor, for we are more interested than any one else, except China, in good government there, only we must at all times, for self-protection, prevent other nations from doing what we have no right to do.

Il faut qu'une porte soit ouverte ou fermée. The island empire of Japan appreciates that the door must be either open or shut, and is determined, so far as in it lies, that it shall not be shut, even although force must be used to keep it open.

Not only will we not seek to assail the integrity or the sovereignty of China, but will eventually be prepared to defend and maintain the same integrity and independence of China against any aggressor. For we know that our own landmarks would be threatened by any outside invasion or interference in China.

After these remarks by way of introduction, the distinguished representative of Japan stated in no uncertain terms that the distrust which had unfortunately grown up between the two countries was caused by neither, but by the machinations of that country with which Japan and the United States are now at war.

I am endeavoring [he said] to secure your coöperation in this work of revision of a situation built upon misconception and fraud. I am asking you to cast out the devil of suspicion and distrust in order that we who are allies and partners may rebuild the shattered edifice of mutual confidence which means so much as a stronghold for us both. We are neighbors, friends, and allies.

By what means is this to be brought about? Like so many of the precious things in life, it lies so near us that we overlook it.

Next, as to the highway to China.

The Pacific Ocean is our common highway. It is guarded and the highway has been swept by our ships of the pirates of the seas so that our countries' trade may continue and our intercourse be uninterrupted. We guard the Pacific Ocean together with our ships.

Here the Viscount might have stopped, for in things material the greatest guarantee is found. Ships were needed to clear the highway of the evil-minded, and ships are needed to guard it, when clear. But, in his opinion, the good faith of two nations, evidenced by their plighted word, is a greater guarantee than the ships whereof he speaks. Thus, he says:

But more than this and better than the ships or the men or the guns is the assurance of the notes exchanged between your Secretary of State, Elihu Root, and our Ambassador Takahira, in 1908, in which it was mutually agreed and "formally resolved to respect the territorial possessions belonging to each other in the region of the Pacific Ocean."

What are these "scraps of paper"? They are two in number, and so brief that he who runs may read their text, which follows:

Notes exchanged between the United States and Japan November 30, 1908, declaring their Policy in the Far East

IMPERIAL JAPANESE EMBASSY, WASHINGTON
November 30, 1908

SIR:

The exchange of views between us, which has taken place at the several interviews which I have recently had the honor of holding with you, has shown that Japan and the United States holding important outlying insular possessions in the region of the Pacific Ocean, the governments of the two countries are animated by a common aim, policy, and intention in that region.

Believing that a frank avowal of that aim, policy, and intention would not only tend to strengthen the relations of friendship and good neighborhood, which have immemorially existed between Japan and the United States, but would materially contribute to the preservation of the general peace, the Imperial Government have authorized me to present to you an outline of their understanding of that common aim, policy, and intention:

1. It is the wish of the two governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.

2. The policy of both governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned and to the defense of the principle of equal opportunity for commerce and industry in China.

3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.

4. They are also determined to preserve the common interest of all Powers in China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that empire.

5. Should any event occur threatening the status quo as above described or the

principle of equal opportunity as above defined, it remains for the two governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

If the foregoing outline accords with the view of the Government of the United States, I shall be gratified to receive your confirmation.

I take this opportunity to renew to Your Excellency the assurance of my highest consideration.

K. TAKAHIRA

Honorable ELIHU ROOT
Secretary of State

DEPARTMENT OF STATE, WASHINGTON
November 22, 1906

EXCELLENCY:

I have the honor to acknowledge the receipt of your note of to-day setting forth the result of the exchange of views between us in our recent interviews defining the understanding of the two governments in regard to their policy in the region of the Pacific Ocean.

It is a pleasure to inform you that this expression of mutual understanding is welcome to the Government of the United States as appropriate to the happy relations of the two countries and as the occasion for a concise mutual affirmation of that accordant policy respecting the Far East which the two governments have so frequently declared in the past.

I am happy to be able to confirm to Your Excellency, on behalf of the United States, the declaration of the two governments embodied in the following words:

1. It is the wish of the two governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.
2. The policy of both governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned, and to the defense of the principle of equal opportunity for commerce and industry in China.
3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.
4. They are also determined to preserve the common interests of all Powers in China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.
5. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

Accept, Excellency, the renewed assurance of my highest consideration.

ELIHU ROOT

His Excellency
BARON KOGORO TAKAHIRA
Japanese Ambassador

After referring to the agreement, evidence alike of statesmanship and good will, Viscount Ishii continued:

Gentlemen, Japan is satisfied with this. Are you? If so, there is no Pacific Ocean question between us. We will coöperate, we will help and we will hold, each of us, what is guaranteed under that agreement.

Viscount Ishii and the people of Japan for whom he speaks can rest assured that the people of the United States answer "Yes" to his question.

JAMES BROWN SCOTT.

FELLOWSHIPS IN INTERNATIONAL LAW

In 1914 the Conference of American Teachers of International Law referred certain matters relating to the study and teaching of international law to a standing committee of the American Society of International Law consisting of Messrs. Philip Marshall Brown, Amos S. Hershey, Charles Cheney Hyde, Harry Pratt Judson, Robert Lansing, Jesse S. Reeves, James Brown Scott, Alpheus H. Snow, and George G. Wilson. A report of this committee in 1916 showed that a considerable number of the recommendations of the Conference had been or were about to be carried out. At the April, 1917, meeting of the Society the Committee at its request was discharged; but it may be advisable to call to attention the following recommendations and action.

The Committee recommended that fellowships in international law be established under the following regulations:

1. These fellowships shall be awarded only to graduate-students holding the equivalent of a bachelor's degree from an approved institution. The stipend attached to such fellowship shall be \$750.00.

Special fellowships may be awarded to teachers in international law or related subjects. At least one year of previous teaching in international law or related subjects, or its equivalent in practical experience, is required. The stipend attached to such fellowship shall be \$1000.00.

2. The qualifications of candidates shall be approved by the Standing Committee on the Study and Teaching of International Law and Related Subjects of the American Society of International Law.

In general a knowledge of the elements of International Law and a good knowledge of history is necessary, and it is desirable that at least two modern languages be furnished. Other special previous preparation will be considered.

The student shall report to the Committee twice during each year.

3. A fellowship shall for the first year be granted to a student to pursue courses only at an institution other than that at which he had been studying for the year preceding.

4. A fellowship may be continued for a second year in the same institution, but no person shall hold a fellowship for more than three years.

It was also recommended that not to exceed five fellowships in each class be awarded for 1917-18.

As the American Society of International Law decided it inadvisable to undertake the administration of these fellowships, the Division of International Law of the Carnegie Endowment for International Peace undertook the carrying out of the recommendations of the Committee.

In April from the candidates applying selections were made to the number of ten and these students are already engaged in their special studies. Owing to the war, changes of plan have been from time to time necessary and a fair estimate of its results cannot under present conditions be made.

Applications for these fellowships for 1918-1919 should be made as early as possible, and, according to the opinion of the Committee, on or before March first in order that awards may be determined in ample season. Such applications as well as inquiries in regard to the fellowships should be addressed to Division of International Law, Carnegie Endowment, 2 Jackson Place, Washington, D.C.

GEORGE G. WILSON.

THE RATIONING SYSTEM

When a state, previously neutral, becomes a belligerent, its interests and its rights are completely altered.

As a neutral, since 1914 the United States has desired the largest possible freedom of trade with all the Powers at war, as well as with their neutral neighbors. But owing to the peculiar position of the Central Powers, and particularly of Germany, with three neutral states bordering upon her and two more separated only by narrow seas, an absolutely unprecedented trade condition arose.

For, obviously, the ports of a neutral cannot be blockaded and goods intended for Germany could make their way through Dutch or Scandinavian channels with little hindrance, the British blockade to the contrary.

Having determined upon a policy of depriving Germany of all commodities which might be of service to her in the prosecution of war, Great Britain carried this policy out by a series of measures. One was the very wide extension of the previously accepted list of contraband, shifting to the occasional category articles not before deemed contraband, and calling fully contraband articles listed previously as occasional. A blockade was declared, laid far from Germany's coasts and covering her Baltic ports, which could not and did not affect Swedish shipping. This was supplemented by the enforced touching of all neutral ships at some British port to have cargo and destination inquired into, a novel requirement. To both blockade and contraband requirements, this served as a supplement. And then to stop traffic still legal, a new usage was set up by which goods for the neutral not contraband were passed only upon the assurance that they should not be exported to Germany.

Against much or all of this our government argued and protested. The continuous voyage doctrine enlarged and the right of blockade extended, seriously interfered with that trade between two neutrals which no belligerent has a right to interrupt whatever his military necessities may dictate. Some of the new British restrictions we accepted, some were not fully pressed, some were under discussion when our own entry into the war, not as an ally of England and France but as having a common enemy, completely changed the face of things. For trading with the enemy was now forbidden to our people; our belligerent rights had replaced our rights and interests as a neutral.

Meanwhile three years of war have lowered the world supply of many commodities to the danger point. This affects neutral and belligerent alike, and is even reflected in the countries where these commodities originate, by a serious enhancement of price. As belligerents we are now concerned in conserving our own supply of such articles, in keeping their cost down, also in saving them for those other belligerents with whom we make common cause. Secondarily, we desire to keep them out of German hands. The instrument which our government employs for this purpose is a license system which permits the export of a wide range of staples produced in this country, only upon the sanction of a specially constituted board. This is coupled with price fixing and commandeering, avowedly war measures extraordinary, just as the license system is. But we are not unmindful of the necessities of our friends, the neutrals, and propose to look out for these by ration-

ing, that is, by permitting them to import from us such quantities of desired goods as we and our fellow-belligerents can spare, such quantities as will barely meet the domestic needs of these neutrals. For we do not feel called upon to put them in position to export their own to Germany and fill the void from our sources.

This is all, I think, quite clear and just and legal, provided we do not violate a treaty or unreasonably limit a trade which the friendship of years has established and sanctioned.

As to the first of these conditions, our treaties with Denmark and with the Netherlands contain no provisions which a limitation of exports would seem to violate. They are elderly treaties with no special war stipulations, but calling for equality of treatment with favored nations, interchange of consuls, extradition and such commonplaces of state intercourse.

The second condition, the unreasonable limitation of an established trade, is perhaps arguable. A decent and considerate belligerent must recognise the difficulty of the position of the Netherlands, for instance. She lies amongst powerful states; she has to import coal, foodstuffs, and various staples. Germany, a contiguous state, refuses coal, unless fats and dairy products are sent in exchange; the Entente Powers in their turn try to put on the screws if dairy products are not furnished themselves in larger quantity than to Germany. We now come in and stop Dutch importation of our wheat unless it be in great part for Belgian relief. Poor Holland is between the upper and the nether millstones.

It is apparent, I think, that the questions thus involved are not questions of law, but of policy and economics. Assuredly a state may embargo its food supply when that is required by its own necessities. The requirements of other belligerents engaged in a common cause may be preferred to the demands of the neutrals, because self-interest, self-preservation perhaps, dictate such a policy. To ration the neutral so straitly as to guarantee that importation plus home products shall leave no margin for an enemy's use does not seem to the writer an unfriendly limitation of established trade considered in the light of military policy. War is a very serious business, not justifying a violation of neutral rights, but certainly justifying the belligerent in preferring his own to neutral interests. He is betraying a trust when he starves his own cause to enrich the neutral and fatten his enemy. There must be very positive treaty obligation or legal requirement to warrant

so doing. On the other hand, friendship demands that he does not wantonly let the neutral starve for want of the necessities of industrial life.

The line between the two obligations can only be determined by a study of the statistics of supply and trade, by friendly negotiation, and by due consideration of the vital interests of all parties.

This policy, as it appears to the writer, our government is honestly trying to pursue.

T. S. WOOLSEY.

ECONOMIC WARFARE

President Wilson, in his reply of August 27th to the peace proposals of His Holiness the Pope, placed himself squarely on record against "the establishment of selfish and exclusive economic leagues," together with punitive damages and the dismemberment of empires, as being "inexpedient, and in the end worse than futile, no proper basis for a peace of any kind, last of all for an enduring peace. That must be based upon justice and fairness and the common rights of mankind."

This utterance is not to be understood as implied censure of the Economic Conference of the Allied Powers at Paris in June, 1916, when measures were devised for the avowed purpose of defense against the plans of the Teutonic Powers for "a struggle in the economic domain which will not only survive the reestablishment of peace but, at that very moment, will assume all its amplitude and all its intensity."¹ It has been pointed out through the press that the President was opposed to any peace permitting the realization of Teutonic plans for economic and military domination, and that for this very reason it was impossible to allow the war to end in a stalemate which would require great military and economic leagues in continued opposition to each other. Peace, to be enduring, must be based on sound principles.

Whatever may be the correct diplomatic interpretation of the President's pronouncement against economic warfare, it is desirable to emphasize its deep significance from the point of view of international law. The economic bases of international relations have not been sufficiently considered. A valuable contribution to the subject has been made by

¹ The recommendations of the Economic Conference were published in the Supplement of Official Documents of this JOURNAL, volume 10, 1916, page 227, and were commented on at length in an editorial of October, 1916, page 845.

Walter Weyl in *American World Policies*, where he effectively pleads for the "economic integration of the world." The subject, however, has received but scanty consideration by international publicists and statesmen.

The true object of law — as Karl Gareis has effectively shown in *Science of Law* — is the protection of interests, whether of the individual, of artificial persons, such as corporations, of society as a whole, or of the great family of nations. Where interests are mutual; where men are bound together by common sympathies and objects, it is not difficult to formulate the law to protect such interests. Where interests are antagonistic, however; where men or nations are pursuing avowedly hostile ends, it is well-nigh impossible to agree on any system of law to regulate their peaceful relations.

It is possible to stress unduly the influence of the economic factor in history, while ignoring the enormous influence of other factors such as nationalism and an idealism which often impel men to act against their material interests. In the field of international politics, however, the economic motive has undoubtedly been extremely powerful. The struggle for colonial empires between the European nations has been responsible for many fearful wars. This ambition has but little weight with a country superbly endowed with natural resources and possessing great home markets such as the United States. It is a matter of vital importance, however, to a country as dependent on other nations as Italy, for example. The acquisition and development of vast territories rich in agricultural and mineral resources, inhabited by backward peoples, and offering splendid markets for industrial products is in some instances a real necessity. The importance of this factor looms very large in the consideration of the Teutonic Powers, as has been most forcibly presented by Friederich Naumann in *Mittel Europa*.

The working out of this factor in international relations has involved centuries of bitter rivalry for colonial empire, the waging of a constant warfare for exclusive markets, the erection of tariff barriers, state aid to industries in the form of subsidies, rebates, and special facilities of various kinds. Under such conditions, one nation is bound to protect its own industries against the dumping of the products of cheaper labor, of greater efficiency, or of industries directly or indirectly aided by their own governments. Democracy finds that it must not merely protect its industries from threatened annihilation. It is bound also to safeguard its human standards of living.

Under such a situation it is not strange that distrust, antagonisms, hatred, and open warfare should arise between nations. The ambition to be economically independent or predominant is essentially inimical to the peaceable regulation of their relations. It is an entirely false basis on which to build any system of law.

The basis of law — it must be reiterated — is a recognition of mutual interests entitled to common protection. Heretofore, international law has been strangely indifferent to the interests of nationalities, to their right to exist — a right which is the very basic principle of the law of nations. It has sought to perpetuate an iniquitous *status quo* in certain instances, the Balkans, for example. It has not sought to base itself scientifically on the vital interests of nations. The present war has been needed to demonstrate the futility of a system of law laid on such uncertain foundations as "balance of power," the suppression of nationalities, and the denial of self-government. And now we are beginning to see the necessity of a recognition of the economic interests of nations as a substantial part of the foundations of international law.

It should be clear to the student of international affairs that no one nation, though blessed with marvelous resources, can afford to attempt to go it alone. Whether it be in respect to economic needs, or intellectual, social, and spiritual cravings, the nations of the world are obviously interdependent. As was said in the editorial above referred to on this subject:

There is a society of nations in which each member is necessary to the well-being of the other and each Power now at war was a party to the solemn recognition by the First and Second Hague Conferences of the "solidarity uniting the members of the society of civilized nations." The things of the spirit have their place in the world, and the coöperation of the nations toward a common goal is more to be desired than the prosperity of any country or of any group of countries. . . . We must live together whether we will or not, and wise statesmanship suggests that the barriers that keep nations apart should be leveled, and that obstacles should not be interposed to their free and untrammelled commerce. We must think of the things we have in common; we must regard our civilization as indivisible.

It is hardly necessary, except with a perverse nation like Prussia, to argue the interdependence of nations, to plead for the abandonment of economic warfare, and for the freedom of international intercourse. The disastrous futility of economic warfare is all too painfully evident.

But we must not fail to realize the logical implications of freedom of international intercourse. If tariff wars, commercial rivalries, struggles for colonies, and exclusive markets are entirely opposed to the establishment of peace, order, and law itself, will freedom of international intercourse conduce to this end? Obviously not, unless nations are able clearly to define their mutual interests throughout the world; to provide the products they require from each other, to acknowledge the services they mutually may render, and the common ends they must serve. This must include the formulation of measures to guard against the flooding of markets by cheaper goods; possibly against undue immigrations of labor itself. This means, in final analysis, an understanding among nations concerning the basic questions of production and distribution — a task well calculated to stagger the statesmen and economists of the world. There cannot be permitted among nations, any more than within the state itself, an unregulated freedom of intercourse. It must be brought about through comprehensive and detailed agreements providing for proper regulations and restrictions.

Let those who fulminate against war in the abstract and flimsily demand the maintenance of peace turn their energies to concrete problems of this character. Let them determine, if they can, with precision, the basic interests of nations. Let them endeavor to draft and secure international legislation for the protection of these interests. These are the practical problems that must first be solved before the world may enjoy the blessings of enduring peace. This is the scientific work remaining to be done to prepare the foundations for a system of law whose function shall be the peaceable regulation of the interests of nations.

The United States has entered the Great War for the cause of international freedom, the right of men to determine their own national destinies. It is earnestly to be hoped that in our concern for the political rights of democracy we do not lose sight of the economic needs of democracy. We would do well to heed the warning of President Wilson against "the establishment of selfish and exclusive economic leagues."

PHILIP MARSHALL BROWN.

THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION

The American Bar Association held its annual meeting this year at Saratoga, where it formerly met, but which it has deserted for some time. It moreover appointed its meeting a week later than usual, holding it on September 4th, 5th and 6th. It is not intended here to go into the long but excellent program of the Association and its various sections and subsidiary organizations and the many hospitalities offered it. The occasion was, however, made memorable by the display of national and patriotic feeling, and many addresses, reports and resolutions, as was natural, dealt with the international situation, which was in all men's minds. It is to these matters only that this comment is of necessity confined, and we must therefore pass by the interesting and critical address of the President, Ex-Senator George Sutherland, and many others.

On the evening of the 3rd, the Judicial Section entertained His Excellency, Boris A. Bakhmeteff, the Russian Ambassador, and in an address before it he said that the inborn conscience of the law of majority is a characteristic feature of the Slav, and especially of the Russian, which was found historically illustrated in the trade cities of Novgorod and Pskow, in the rule of religious sects and in the innumerable student and intellectual committees, and on this "embryonic self-government" he based "the possibility of establishing a firm and self-depending democracy within a people which for centuries have been bound to slavery."

At the first session of the whole Association on the morning of September 4th, Hon. Elihu Root, declaring that if Germany won, it meant the end of law and order, amid cheers and universal response, moved the following resolution.

Resolved:

The American Bar Association declares its absolute and unqualified loyalty to the Government of the United States.

We are convinced that the future freedom and security of our country depend upon the defeat of German military power in the present war.

We approve the entrance of the United States into the war before it was too late to find success through the united action of the Democratic Powers.

We urge the most vigorous possible prosecution of this war with all the strength of men and materials and money which this country can supply.

We stand for the speedy dispatch of the American army, however raised, to the

battle-front in Europe where the armed enemies of our country can be found and fought and where our own territory can be best defended.

We condemn all attempts in Congress and out of it to hinder and embarrass the Government of the United States in carrying on the war with vigor and effectiveness.

Under whatever cover of pacificism or technicality such attempts are made, we deem them to be in spirit pro-German and in effect giving aid and comfort to the enemy.

We declare the foregoing to be the overwhelming sentiment of the American Bar.

These declarations were received with applause and enthusiasm and carried by a unanimous rising vote. They gave character to the whole meeting, which thus became a continuous patriotic demonstration.

Resolutions were adopted during the day calling upon lawyers, individually and in associations, to render service to those entering the Federal Service, to aid Exemption Boards, to conserve the practice of lawyers who enter the Army and to give relief to their families, to aid the Federal and State Governments in all matters helping to win the war, and to be always willing to supply speakers for patriotic meetings.

It seems fit to mention that in the evening of the same day, Francis Lynde Stetson presented a careful and extended memorial of Hon. Joseph Hodges Choate, the beloved Nestor of the Bar, not only a former president of the association, but a former Ambassador to Great Britain and, from its first beginning, a Vice-president of the American Society of International Law, and by great services and employments at the bar, deeply identified with international law.

It accented Mr. Choate's learning, ability, tireless industry, affectionate consideration for his brother lawyers, and "his bristling armory of wit." It called Mr. Choate "the heart not less than the head of the American Bar" and applied to him his own noble eulogy of Rufus Choate: "Emerson most truly says that character is above intellect, and this man's character surpassed even his exalted intellect, and controlling all his great endowments made the consummate beauty of his life."

On the second day at the morning session this writer, as Chairman of the Standing Committee on International Law, in a brief oral statement presented its report. It referred to the fact that a year ago the committee ventured to say, "that the duty of main-

taining neutral rights falls of necessity primarily upon the United States, the greatest of the neutral Powers; that its efforts to maintain and enforce the humanizing restraints imposed upon all belligerents by international law ought not to be abandoned or in any way remitted." The report added "That the President and the Congress of the United States have not faltered or turned aside from the full performance of these high and controlling obligations." It quoted the address of the President on April second to Congress and the action of Congress in full accord, and declared "its hearty and unanimous concurrence in the views of international right, of human obligations and national duty so powerfully presented by the President and so justly supported by the Congress."

Under ten heads it protested and denounced as gross violations of the settled rules of international law, and of the usages of war between civilized nations, the acts and practice of the German Powers.

It expressed the hope that at the near close of the war "the beneficent principles of international law which order the relations of States in lines of justice, humanity and civilization, may again prevail with renewed force and charity."

A chronological table, with references, covering 21 pages, of events of an international character directly affecting the United States within the past year was appended and submitted.

The committee solicited no action by the Bar, but the association at once took action by resolution receiving and approving the report, which was adopted by a unanimous rising vote, and also provided for the communication of the report to the Committee on Public Information in Washington for wide distribution.

On the evening of the same day, Hon. Charles E. Hughes of New York delivered a ringing and convincing address on "War Powers under the Constitution," strongly supporting them in the amplest form. He was received with great favor and made the whole subject luminous and profoundly interesting.

The address which followed on the same evening was not strictly legal, but was delivered at the request and by the designation of the National Security League (Bureau of Patriotism through Education). The speaker was Robert McNutt McElroy, Ph.D., of New Jersey, head of the Department of History in Princeton University. The subject was "The Representative Idea and the War." It was a valuable and scholarly review of German writings, teachings and conduct showing

hostility to the representative idea. Both these addresses were by special resolution ordered printed at once for general distribution.

On Thursday, September 6th, Mr. William H. Burgess of Chicago (late of Texas), greatly interested the Association by an address entitled "A Hothouse Constitution; Mexico, 1917." He showed that this remarkable document, the new Constitution of Mexico, was adopted in entire disregard of the provisions of the existing Constitution which provide for revision and amendment by a two-thirds vote of Congress approved by a majority of the Legislatures of the States. The new Constitution was formed by a convention of delegates from a part only of the States, and approved by a "Rump Congress." That though seemingly most advanced, humane and communistic, it gives powers of suspension to the President and Council which neutralise these powers at the will of the government. It establishes, for the first time in Mexico, trial by jury as a constitutional right. It expressly declares the right of the nation to impose such limitations on private property and upon the development of natural resources, as it may see fit in order to conserve them and equitably distribute the public wealth. The ownership of all minerals, including petroleum, is vested in the nation. It limits the right to acquire ownership in lands and water to Mexicans and Mexican companies, or foreigners who agree to be considered as Mexicans as to such property and not to ask the protection of their own government as to the same. Within 100 kilometers of the frontier and 50 kilometers of the sea coast, no foreigner shall under any circumstances acquire ownership. All ecclesiastical property is vested in the state.

Mr. Burgess found this Constitution "radical beyond anything that ever has been undertaken, so far as I know, in any American State or any portion of the English-speaking world," and expressed the opinion that this "organic law was calculated to develop beyond all calculation a system of official blackmail." Its international importance is obvious when we reflect that Mexican oil is largely moving the fleets of the world, to refer to one item only.

Thursday afternoon, before one of the largest and most interested audiences of the meeting, Maître Gaston de Leval, of the Bar of Brussels, discussed "Prussian Law as Applied in Belgium." He showed that the Bar of Belgium stood as one man against the reign of terror of the Germans in that distracted country; that in the regions where fighting was going on the law administered was "nothing

else than the more or less fanciful order of the military commandant," and that in the provinces when there was no more fighting the German authority gradually superseded the Belgian municipal authorities under their Teutonic system, devised to exploit the territory for any, even slight and remote, advantages to Germany, and without regard to its own welfare or necessities. The Hague Convention provided that military occupants should respect the laws of the country and make changes only for "absolute necessity." The Germans held any advantage to themselves, however slight or remote, was such "necessity" and extended their rigorous control to all things, even those having no connection with military affairs.

The German code makes foreigners in a country occupied by German troops subject to the penal provisions of the code for acts against the troops, their suite, or against the German authority, and this was most broadly interpreted and vigorously applied, contrary to the Hague Convention for preserving local law. The Belgians were arrested, prosecuted and condemned by thousands under unknown provisions of German law, never as yet even published or proclaimed in Belgium. To illustrate how minute this military interference was, "If the owner of a restaurant was to fry potatoes instead of cooking them according to the German fashion, he had to be brought before the German military court." The Germans requisitioned raw material from the Belgium factories, forcing them to close, and the workmen were thus thrown into the streets. The Germans then offered them work in employments hostile to their country. Most refused, and by a decree of the German Governor General in 1916, a penalty of three years imprisonment and 20,000 marks fine was imposed for such refusal. Another decree provided that they might be made to work by military force, so that by a regular system the Belgian workmen were deprived of work, then offered employment hostile to their own country, and made criminals and savagely punished if they refused it, as by international law they had a right to.

Maitre de Leval's address was heard with deep interest and sympathy by the bar, and as a testimonial to him and his country he was elected to honorary membership in the American Bar Association, which he with warm feeling accepted. Nothing is said here of those portions of his address which he requested should not be reported.

The meeting of the Association closed with a great dinner over

which President Sutherland presided with great spirit and success. The speeches were admirable, but cannot be mentioned individually, except that of the guest of honor, Hon. Elihu Root, which was of international importance. Fresh from his official labors as head of our commission to Russia, he spoke at length of his observations there with his customary clearness of statement, and a depth of emotion unusual with him. He paid a moving tribute to the character of the Russian people, to their self-control, their experience and success in local self-government and the capacity he discerned in them for national self-government. He dwelt on their excellence of heart and head. His statement that in the midst of the revolution a young woman could go at any hour of the day or night, alone and unattended, from one end of Petrograd to the other without fear of injury or insult, was one of the striking facts mentioned in defense of that great people.

The whole audience rose and cheered him standing more than once as he proceeded, and the address produced a profound impression on the great assembly of men who especially shape, expound and administer the laws of the United States.

The general officers elected for the coming year were:

WALTER GEORGE SMITH, of Philadelphia, Pa., *President*.

GEORGE WHITELOCK, of Baltimore, Md., *Secretary*.

FREDERICK E. WADHAMS, of Albany, N. Y., *Treasurer*.

and the following members of the Executive Committee.

CHARLES U. POTTER, Cheyenne, Wyoming

JOHN LOWELL, Boston, Mass.

CHAS. BLOOD SMITH, Topeka, Kansas

ASHLEY COCKRELL, Little Rock, Ark.

GEORGE T. PAIGE, Peoria, Ill.

T. A. HAMMOND, Atlanta, Ga.

U. S. G. CHERY, Sioux Falls, S. D.

and CHARLES T. TERRY, New York City

Seldom has the interest been so well sustained at any meeting of the National Bar or the addresses more brilliant and noteworthy, and never has there been displayed such high, united patriotic feeling which never faltered in its support of our leaders in the great war.

CHARLES NOBLE GREGORY.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Cd.*, Great Britain, Parliamentary Papers; *Clunet*, J. de Dr. Int. Privé, Paris; *Current History* — Current History — A Monthly Magazine of the New York Times; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletín de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; *M.*, Magazine; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Belgium, Moniteur belge; *Martens*, Nouveau recueil général de traités, Leipzig; *Official Bulletin*, Official Bulletin of the United States; *Q. Quarterly*; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

August, 1914.

- 10 GERMANY—UNITED STATES. Emperor William of Germany sent telegram to the President of the United States relative to the origin of the European War. Text: *Congressional Record*, 55: 6382.

January, 1917.

- 3 FRANCE. Amended contraband list announced. *J. O.*, Jan. 3, 1917.

February, 1917.

- 10 NETHERLANDS. Decree promulgated requisitioning Dutch ships. *Staatsblad*, 1917, No. 211.

March, 1917.

- 23 SPAIN. Decree promulgated appointing the Marques de Cortuna to negotiate with Great Britain and France an arrangement by which trade may be carried on in the natural and manufactured products of the respective countries. *Gaceta de Madrid*, March 23, 1917.

April, 1917.

- 6 NETHERLANDS — GERMANY. Netherlands refused the German demand that armed ships be interned. *N. Y. Times*, April 7, 1917.
- 7 NETHERLANDS. Exportation of all metals forbidden. *Staatsblad*, 1917, No. 279.
- 14 SWITZERLAND. Declared neutrality in the war between Germany and the United States. *J. O.*, 1917: 3097; *Clunet*, 44: 1176.
- 9-June 13. RUSSIA. Proclamations issued by the Provisional Government and the Council of Workmen's and Soldiers' Delegates relative to terms of peace. Texts: *Congressional Record*, 55: 6889.

May, 1917.

- 29-June 2. NATIONAL CONFERENCE ON FOREIGN RELATIONS. A National Conference on Foreign Relations was held at Long Beach, N. J., under the auspices of the Academy of Political Science in the City of New York and the American Society of International Law. *Proceedings of the Academy of Political Science in the City of New York*, Vol. 7.

June, 1917.

- 3 URUGUAY. Uruguayan ship *Rosario* sunk. *La Prensa* (Buenos Aires), June 7, 1917.
- 3 RUSSIA — UNITED STATES. American Mission arrived in Russia. *N. Y. Times*, June 4, 1917.

June, 1917.

- 4 ROUMANIA — UNITED STATES. Roumania informed that a Roumanian mission to the United States would be acceptable. The United States has maintained a Minister to Bucarest but Roumania has never had a representative in Washington. *Official Bulletin*, Vol. 1, No. 21.
- 7 LUXEMBURG. Announced that the American Ambassador at Paris had sent to the Department of State a petition addressed to the President presented by representatives of the "Franco-Luxembourgeois" Committee, which consists of people of Luxemburg who have found refuge in Paris. Text: *Official Bulletin*, Vol. 1, No. 24.

- 9 BELGIUM — GERMANY. Belgium answered the German note on deportations. Text: *Official Bulletin*, June 9, 1917.
- 12 UNITED STATES. The Secretary of the Navy ordered to take over certain German vessels. *Executive Order*, No. 2635.
- 12 GREECE. King Constantine abdicated in favor of his younger son Alexander. *N. Y. Times*, June 13, 1917.
- 13 ITALY — BRAZIL. Italy acknowledged the note of Brazil announcing revocation of Brazilian neutrality in the war between the United States and Germany. Spanish text: *La Prensa* (Buenos Aires), June 14, 1917.
- 13 UNITED STATES — CANADA. The International Joint Commission made final report on the Lake of the Woods boundary. *Official Bulletin*, June 13, 1917.
- 13 FRANCE — GREAT BRITAIN. French decree promulgated approving commercial agreement relative to Egypt and Morocco, signed Aug. 24, 1917. *J. O.*, 1917: 4823.
- 13 BRAZIL — URUGUAY. Uruguay acknowledged the note of Brazil announcing revocation of Brazilian neutrality in the war between the United States and Germany. Spanish texts: *La Prensa* (Buenos Aires), June 14, 1917.
- 15 UNITED STATES — JAPAN. United States announced that Japan was sending a mission to the United States headed by Viscount Baron Kikujiro Ishii. Personnel of mission: *Official Bulletin*, Vol. 1, No. 31; The mission arrived in the United States Aug. 13, 1917.

June, 1917.

- 15 UNITED STATES — GERMANY. The United States addressed a communication to Germany through the Spanish Government asking a statement of intentions with regard to the pay of American naval and military officers who may be taken prisoners of war by Germany and proposing a reciprocal agreement under which the United States will grant to all German officers taken prisoners the same rate of pay as officers of corresponding rank in the United States Army. *Official Bulletin*, Vol. 1, No. 30.
- 15 UNITED STATES — RUSSIA. Greetings exchanged at Petrograd upon the formal presentation of visiting American mission to Russian Council of Ministers. Text: *Official Bulletin*, Vol. 1, No. 26.

- 16 GREECE. The Entente Allies raised the blockade in force since Dec. 8, 1916. *J. O.*, 1917: 4615.
- 19 BRAZIL — FRANCE. France acknowledged the note of Brazil announcing the revocation of Brazilian neutrality in the war between Germany and the United States. Spanish text: *La Prensa* (Buenos Aires), June 20, 1917.
- 16 HAITI. Haiti handed passports to the German chargé. The Haitien chargé in Berlin had already been handed passports by Germany. *La Moniteur* (Haiti), June 20, 1917; *Official Bulletin*, Vol. 1, No. 35.
- 20 ITALY. House of Deputies passed a declaration stating aims of Italy in present war. Spanish text: *La Prensa* (Buenos Aires), June 21, 1917.
- 21 COSTA RICA — BRAZIL. Costa Rica acknowledged note of Brazil announcing the revocation of Brazilian neutrality in the war between the United States and Germany. Spanish text: *La Prensa* (Buenos Aires), June 22, 1917; *N. Y. Times*, June 23, 1917.
- 21 COLOMBIA. Declaration issued reaffirming neutrality in the European war. Spanish text: *La Prensa* (Buenos Aires), June 22, 1917.
- 22 BRAZIL — UNITED STATES. The United States acknowledged the note of Brazil announcing the revocation of Brazilian neutrality in the war between Germany and the United States. Spanish text: *La Prensa* (Buenos Aires), June 23, 1917.
- 23 ARGENTINE REPUBLIC. Announced that a congress of neutrals would meet August 15. *La Prensa* (Buenos Aires), June 24, 1917.
- 23 RUSSIA. Congress of Workmen's and Soldiers' Delegates abolished the Russian Duma. Text of Resolution: *London Times*, June 28, 1917.
- 23 URUGUAY. Statement issued defining Uruguayan attitude in the war. Spanish text: *La Prensa* (Buenos Aires), June 23, 1917.
- 24 AUSTRIA. Provisional ministry formed with Dr. von Leydler as premier. *N. Y. Times*, June 25, 1917.
- 25 GERMANY. Amendments made to the Prize Ordinance of September 30, 1909, and supplements of Oct. 18, Nov. 23, Dec. 14, 1914, April 18, 1915, June 3, July 22, 1916 and Jan. 9, 1917. Text: *London Gazette*, No. 30219.

- 26 UNITED STATES. First contingent of American troops under Major-General W. L. Sibert arrived at a French port, having sailed June 14, 1917. *N. Y. Times*, June 27, 1917.
- 28 RUSSIA. Provisional government announced September 30 as the date for elections to the constituent assembly and October 13 as date for first meeting of assembly. *N. Y. Times*, June 29, 1917.
- 28 GREECE. Premier Venizelos announced new Greek cabinet. *N. Y. Times*, June 29, 1917.
- 28 GERMANY — NORWAY. In the Storthing, Foreign Minister Ihlen gave an account of the German plot to blow up Norwegian ships. *N. Y. Times*, June 30, 1917.
- 27 BRAZIL — GERMANY. German ships requisitioned. *La Prensa* (Buenos Aires), June 28, 1917.
- 30 ARGENTINE REPUBLIC — UNITED STATES. Senate of Argentine Republic passed a resolution authorizing the President to receive and entertain the American fleet. Text: *La Prensa* (Buenos Aires), July 1, 1917.

July, 1917.

- 1 CHINA. The Emperor Hsuan-Tsing was restored to the throne of China. On July 8 he abdicated. On July 14 Feng Kuo-Chang issued a proclamation announcing that he had taken over the office of Provisional President. Texts: *N. Y. Times*, July 4, 10, and 15, 1917.
- 2 GREAT BRITAIN. Order in Council issued amending contraband list. *London Gazette*, 30161; *Official Bulletin*, Vol. 1, No. 55.
- 2 GERMANY — GREAT BRITAIN. Agreement signed concerning combatant and civilian prisoners of war. Text: *Cd. 8590*; *London Times*, Aug. 3, 1917.
- 4 GERMANY. Dr. von Bethmann-Hollweg resigned as Chancellor, being succeeded by Dr. Georg Michaelis, former Prussian Under Secretary of Finance and Food Controller. On July 19, Dr. Michaelis made a statement as to peace aims of Germany. On July 29 he issued a statement to the press. *N. Y. Times*, July 15, 21, 30, 1917.
- 7-Aug. 20. SERBIA. Conference of Serbs, Slavs and Slovenes held at Corfu. Declaration issued relative to national unity.
- 11 CHILE — URUGUAY. Chile acknowledged the note of Uruguay declaring that it would not regard as a belligerent any American

- nation which is in a state of war with nations of other continents, approving of the position taken by Uruguay. *Washington Post*, July 12, 1917.
- 11 FRANCE. Contraband list modified and added to. *J. O.*, Oct. 14, 1915, Jan. 27, Apr. 13, June 28, Oct. 13, Nov. 23, 1916, Jan. 2, 3, July 11, 1917.
- 13 UNITED STATES. Proclamation issued forbidding the transaction of the business of German marine and war risk insurance companies during the war either as insurers or re-insurers. Proclamation No. 1386 . . . ; *N. Y. Times*, July 15, 1917; *Official Bulletin*, Vol. 1, No. 55.
- 19 GERMANY. Hugo Hasse in speech in Reichstag referred to a secret meeting at Potsdam, July 5, 1914 between Austrian and German officials, including the Kaiser, at which the Austrian ultimatum to Serbia was decided upon. On Aug. 3 the United States announced that it was in possession of the facts in the case. *N. Y. Times*, July 29; Text of Speech: *N. Y. Times*, Aug. 4, 1917.
- 20 RUSSIA. Alexander Kerensky, the Minister of War, became Prime Minister upon the resignation of Prince Ivoft. *N. Y. Times*, Aug. 21, 1917.
- 20 GERMANY. The Reichstag passed a peace resolution. On July 26, a resolution stating that the Reichstag resolution expressed the principles for which Great Britain was fighting was defeated in the House of Commons by a vote of 148 to 19. Text: *N. Y. Times*, July 21, 27, 1917; *Congressional Record*, 55: 6887.
- 20 GERMANY. Chancellor Michaelis addressed the Reichstag declaring that Germany contemplated no new peace offer but was willing to treat with the Allies if they opened negotiations. *Congressional Record*, 55: 6889.
- 22 SIAM — AUSTRIA — GERMANY. Siam declared war against Austria and Germany. Nine German ships were seized and found to have been badly damaged. *N. Y. Times*, July 27, 1917. The declaration against Austria was presented to the Austrian Foreign Office by the Siamese Minister July 29. *N. Y. Times*, July 30, 1917.
- 23 SERBIA — AUSTRIA HUNGARY — BULGARIA. Serbia presented a protest to the Powers charging Austro-Hungarians and

Bulgarians with plundering the nation, and reserving the right of indemnity at the conclusion of peace. Text: *N. Y. Times*, July 25, 1917.

- 24 MIDDLE EUROPE. Announced that an Austro-German Economic Conference is being held in Vienna for the purpose of forming a "Middle Europe" alliance to off-set the economic alliance of the Allies. *N. Y. Times*, July 29, 1917.
- 24 IRELAND. Names of nominees to the Irish Convention announced. On July 25 the convention met in Dublin, and adjourned on July 26 till Aug. 8. *N. Y. Times*, July 25, 27, 1917.
- 24 PORTUGAL. Regulations issued relative to allied and neutral cargoes from enemy ships seized by Portugal. English text: *London Gazette*, No. 30199.
- 25 UNITED STATES. Joint Resolution introduced in the House of Representatives authorizing and empowering the President to make such treaties with foreign countries as will define the military status of their subjects resident in the United States. *Congressional Record*, 55: 5999; *H. J. Res*, 128, 63d Cong. 1st sess.
- 25-27 BALKANS. Conference of representatives of the Entente Allies held to determine aims, etc. in the Balkans. Text of *communiqué*: *London Times*, Weekly ed. Aug. 3, 1917.
- 29 GERMANY — SWITZERLAND. Announced that Germany would only deliver coal to Switzerland on condition that Switzerland grant a large loan to Germany. *N. Y. Times*, July 30, 1917.
- 31 GERMANY — TURKEY — BULGARIA. Germany notified Turkey and Bulgaria that she would assume all expenses incurred by those countries in the campaign of 1917-18. *N. Y. Times*, Aug. 1, 1917.

August, 1917.

- 1 RUSSIA. Minister for Foreign Affairs sent telegram to Russian diplomatic representatives accredited to the Allied Powers declaring that Russia would not make the separate peace. Text: *London Times*, Aug. 3, 1917.
- 1 VATICAN. Pope Benedict XV sent a peace proposal to the belligerent powers. Text: *Official Bulletin*, Vol. 1, No. 84.
- 1 GERMANY. German Emperor issued a proclamation to the

- German people and the German fighting forces. Text: *N. Y. Times*, Aug. 2, 1917.
- 2 CHINA. Provisional President approved decision of Chinese cabinet to declare war on Germany and Austria-Hungary. *N. Y. Times*, Aug. 7, 1917.
 - 3 FINLAND. Russian Provisional Government declared Finland's Declaration of Independence illegal, as lacking the sanction of the Russian Government and people. Provision has been made to submit the question of future relations to the new Finnish Parliament to be chosen October 1, 1917.
 - 3 RUSSIA. M. Terestschenko, Foreign Minister, resigned. *N. Y. Times*, Aug. 4, 1917.
 - 3 SWITZERLAND. Order issued requisitioning entire cereal crop, except quantity required for personal consumption and seed purposes. *N. Y. Times*, Aug. 4, 1917.
 - 4 GREECE. King Alexander took the oath of office as King. *N. Y. Times*, Aug. 6, 1917.
 - 4 LIBERIA. Joint resolution passed by Liberian Congress declaring war on Germany. *Official Bulletin*, Vol. 1, No. 76.
 - 5 ARGENTINE REPUBLIC — GERMANY. Argentine Republic sent a final demand to Germany relative to indemnity for ships sunk, etc. *N. Y. Times*, Aug. 6, 1917.
 - 6 GERMANY. Changes in Cabinet announced. Dr. Richard von Kuhlmann succeeded Alfred Zimmermann as Secretary for Foreign Affairs. List of members: *N. Y. Times*, Aug. 7, 1917.
 - 7 UNITED STATES. Resolution introduced in Congress authorizing the President to suggest a world peace conference. *Congressional Record*, 55: 6475.
 - 7 BALKANS. A continuation of the Paris Conference was opened in London. *N. Y. Times*, Aug. 7, 1918.
 - 9 GERMANY — PERU. Germany offered to submit to a prize court the circumstances of the sinking of the Peruvian bark *Lurton*, sunk Feb. 5, 1917, in Spanish territorial waters. Peru refused the offer, asking damages and indemnities. *N. Y. Times*, Aug. 10, 1917.
 - 10 PERU. Peruvian senate passed resolution of sympathy with the motive of the United States for participating in the European war as declared by President Wilson. *N. Y. Times*, Aug. 10, 1917.

- 13 JAPAN. The Japanese mission arrived in the United States. *Official Bulletin*, Vol. 1, No. 81.
- 14 CHINA. Chinese Government declared a state of war to exist with Germany and Austria-Hungary from 10 A.M. of Aug. 14. *Official Bulletin*, Vol. 1, No. 84.
- 17 CHINA — AUSTRIA-HUNGARY. The Austro-Hungarian Minister to China informed the Chinese Government that Austria-Hungary considered the declaration of war against Austria-Hungary illegal and unconstitutional on the ground that the Constitution of China requires that such a declaration must have the approval of both houses of Parliament. *N. Y. Times*, Aug. 19, 1917.
- 18 GERMANY. Germany accepted the conditions offered under which hospital ships would be spared. Under this agreement a neutral commissioner will be carried on each ship to guarantee that it transports only sick and wounded. *N. Y. Times*, Aug. 19, 1917.
- 20 UNITED STATES. Resolution introduced in the Senate proposing as a war measure an international convention for the purpose of terminating international anarchy, establishing international government in lieu thereof and coercing the Teutonic military conspiracy by the organized commercial, financial, military and naval Powers of the world. *S. J. Res. 94*; 65th Cong. 1st sess. *Congressional Record*, 55: 6751.
- 20 GERMANY — SWITZERLAND. New economic convention signed. *Washington Post*, Aug. 22, 1917.
- 21 DENMARK. The Minister of the Interior issued an embargo on all Danish ships being sold to citizens or companies not Danish. No ships building may be sent out of the kingdom except by special license. *Official Bulletin*, Vol. 1, No. 87.
- 21 CUBA — UNITED STATES. The President of Cuba signed decree transferring to the United States four German steamships which were seized when Cuba declared war against Germany. *Official Bulletin*, Vol. 1, No. 91.
- 21 HUNGARY. Count Maurice Esterhazy resigned as Premier and Dr. Wekerle was appointed in his place. *N. Y. Times*, Aug. 22, 1917.
- 23 PERU — UNITED STATES. The President of Peru in an address to Congress announced the opening of Peruvian ports to war-ships of the United States. *Official Bulletin*, Vol. 1, No. 89.

- 26 UNITED STATES — RUSSIA. The President of the United States sent greetings to the National Assembly at Moscow. *Official Bulletin*, Vol. 1, No. 92.
- 26 BELGIUM. The Belgian Government addressed a protest to allied and neutral governments against German violations of international and moral law in the redistricting of Belgium so that it will have two governments and two capitals, and in deporting or arresting Belgian officials who resigned their posts rather than continue in office under the new régime. Summary of text: *N. Y. Times*, Aug. 27, 1917.
- 27 SERBIA. Serbia protested to the Powers against the economic exploitation of the Serbian provinces by the Austro-Hungarian and Bulgarian authorities. The Government of Serbia moved from Corfu to Saloniki.
- 28 UNITED STATES — VATICAN. The President of the United States replied to the peace proposal of Pope Benedict XV. *Official Bulletin*, Vol. 1, No. 94; *Congressional Record*, 55: 7027.
- 28 ARGENTINE-REPUBLIC — GERMANY. Germany replied to the note of Argentine Republic dated Aug. 5, agreeing to the demand for indemnity and guarantee against future losses. On Aug. 30, the Argentine Republic accepted the settlement by Germany. *N. Y. Times*, Aug. 29, 31, 1917.
- 28 UNITED STATES — NETHERLANDS. Under an agreement with the Netherland Government, the United States has released 30 Dutch ships laden with grain. *N. Y. Times*, Aug. 29, 1917.
- 28 UNITED STATES — ITALY — BELGIUM — SERBIA. Announced that agreements have been signed by the Secretary of the Treasury, with the approval of the President, on behalf of the United States and by the Ambassador of Italy and the Ministers of Belgium and Serbia providing that all purchases made by their governments in the United States shall be made through the commission composed of Bernard M. Baruch, Robert S. Lovett and Robert S. Brookings. Similar agreements were previously signed by representatives of Great Britain, France and Russia. *Official Bulletin*, Vol. 1, No. 93.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN ¹

Aliens Restriction Order, 1916. Order in Council further amending. June 13, 1917. (St. R. & O. No. 545.) 1½d.

Commercial Treaties (Hertslet's). Treaties and conventions between Great Britain and foreign Powers, and laws, decrees, orders in Council, etc., concerning the same, so far as they relate to commerce and navigation, slavery, extradition, nationality, copyright, postal matters, etc., and to the privileges and interests of the subjects of the high contracting parties. Vol. XXVII. *Foreign Office*. 15s. 7d.

Contraband of war. Proclamation, July 2, 1917, consolidating, with additions and amendments, the lists of articles to be treated as. (St. R. & O. 665.)

Defense of the Realm Manual. Fourth enlarged edition, revised to May 31, 1917. Comprising the Defense of the Realm Acts; the regulations thereunder reproduced as one single consolidated code; and all the general orders made under the regulations. With editorial notes and a full analytical index. 5s. 6d.

Exportations. Proclamations consolidating the previous proclamation and orders of council prohibiting the exportation of certain articles. May 10, 1917. (St. R. & O. No. 431.) 2d.

Food Supply Manual. (first ed.) Revised to May 15, 1917. Comprising introductory note; constitution and powers of the Ministry of Food [Acts and Orders, with notes]; orders of the Food Controller as to maintenance of food supply [with notes]; analytical index to acts, orders and notes. 1s. 1½d.

Imperial War Conference, 1917. Extracts from the minutes of proceedings; and papers laid before the conference. (Cd. 8566.) 1s. 10d.

Military service (Conventions with allied states). Act. (7 & 8 Geo. V. Ch. 26.) 1½d.

¹ Official publications of Great Britain may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

Nicaragua. Treaty between the United Kingdom and, for the regulation of the turtle fishing industry as regards vessels belonging to the Cayman Islanders. Signed at Guatemala, May 6, 1916. (Treaty series, 1917, No. 8.) 1½d.

Prisoners' camps in Germany, use of police dogs in. Correspondence respecting. (Cd. 8480.) 2½d.

Prisoners of War Committee, Central, Organisation and methods. Report of Joint Committee. (H. of L. Papers & Bills, 1917, No. 60.) 2½d.

Russia. Agreement concluded between H. M. Government and the Provisional Government of Russia relative to the reciprocal liability to military service of British subjects resident in Russia and Russian subjects resident in Great Britain. (Cd. 8588.) 1½d.

State papers relating to English affairs in the Vatican archives and library. Vol. I. Elisabeth. 1558-1571. 15s. 7d.

Trading with the Enemy. Consolidated statutory list of persons and firms in countries, other than enemy countries, with whom persons and firms in the United Kingdom are prohibited from trading. With notes to British merchants engaged in foreign trade. Complete to June 22, 1917. Prefaced by the proclamation of May 23, 1916, prohibiting trading with certain persons, or bodies of persons, of enemy nationality or enemy association. No. 29a. 7½d.

War aims, Allied. Note from the Russian Provisional Government and the British reply respecting. (Cd. 8587.) 1½d.

UNITED STATES ²

Alien enemies. Executive order directing that lists of alien enemies interned in United States be forwarded to International Red Cross at Geneva. May 9, 1917. (No. 2616.) *State Dept.*

———. Issuance of permits to. Instructions to United States marshals and deputies. *Justice Department.*

Chinese in United States. Treaty, laws, and rules governing admission of Chinese. May 1, 1917. 62 pp. Paper, 5c. *Immigration Bureau.*

Dominican Customs Receivership. Report of tenth fiscal period

² When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

under American Dominican convention of 1907, Jan. 1-Dec. 31, 1916, with summary of commerce. 1917. 48 pp., il. *Insular Affairs Bureau*.

Embargo on certain exports in time of war. Proclamation No. 1385. July 9, 1917. 2 pp. *State Dept.*

Enemy ships. Joint resolution authorizing the President to take over for United States possession and title of any vessel within its jurisdiction which at time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which United States may be at war, or was under register of any such nation. Approved May 12, 1917. (Pub. res. 2.) 5c.

———. Executive Orders directing transfer of German vessels: No. 2619A, May 14, 1917; No. 2621, May 16, 1917; Nos. 2624-25, May 22, 1917; No. 2635, June 12, 1917. *Merchant Marine and Fisheries Committee*.

———. List of German and Austrian vessels in American ports. (H. rp. 37).

Exports Council. Executive order establishing. June 22, 1917. 1 p. (No. 2645.) *State Dept.*

Exports in time of war. Hearings on H. R. 3349 to authorize President to give direction to. April 23, 1917. 16 pp. *Interstate and Foreign Commerce Committee*.

Foreign relations. Act to punish interference with, neutrality, and foreign commerce of United States, to punish espionage, and better to enforce criminal laws of United States. Approved June 15, 1917. 16 pp. (Public 24.) 5c.

———. Hearings, April 9 and 12, 1917. (Serial 53, pt. 2.) *Judiciary Committee*.

German vessels. Executive orders authorizing Shipping Board to take over. (Nos. 2651 and 2653.) June 30 and July 3, 1917. *State Dept.*

Great Britain. Resolutions passed by British Parliament relative to entry of United States into war. May 26, 1917. 2 pp. (H. doc. 154.) *State Dept.*

International claims. Letter recommending that \$2000 be paid to family of Tatsuji Saito, Japanese subject, killed presumably by American soldiers at Camp Geronimo, Mexico. June 21, 1917. 2 pp. (H. doc. 194.) *State Dept.*

International High Commission. Appendix to report of United States section on first general meeting at Buenos Aires, April 3-12,

1916. (House doc. 1788, 64th Cong., 2d sess.) 179 pp. (S. doc. 739, 64th Cong., 2d sess.)

International Joint Commission on Boundary Waters between United States and Canada. Hearing, order and opinion upon application of United States for approval of certain improvements in St. Clair River at Port Huron, Mich. Decided May 18, 1917. 52 pp., map. *State Dept.*

International Parliamentary Conference on Commerce at Rome. Information relative to. May 5, 1917. 1 p. (H. doc. 119.) *State Dept.*

Immigration laws. Rules of May 1, 1917. 96 pp. map. Paper, 10c. *Immigration Bureau.*

Military laws of United States, 1915, with supplement including laws of 64th Congress to March 5, 1917. 5th ed. 1076 pp. (War Dept. doc. 472.) Cloth, \$1.50.

Naturalization of resident aliens who had declared their intention or were entitled to become citizens before April 6, 1917. Report to accompany bill. July 11, 1917. 4 pp. (H. rp. 92.) *Immigration and Naturalization Committee.*

Niagara River, Diversion of waters of. Hearings May 25-June 6, 1917. 2 pts. ii + 1-93 pp. *Foreign Affairs Committee.*

Panama Canal. Rules and regulations for regulation, management, and protection of Panama Canal and maintenance of its neutrality. (Proclamation No. 1371.) May 23, 1917. 2 pp. *State Dept.*

Panama Canal Rules. Hearings on H. R. 1655 providing that rules shall govern in measurement of vessels for imposing tolls. May 1, 1917. 28 pp. *Interstate and Foreign Commerce Committee.*

———. Hearings, April 19, 1917. 66 pp. *Interoceanic Canals Committee.*

Pan-American Scientific Congress, Second. Washington, Dec. 27, 1915-Jan. 8, 1916. Report of Secretary-General. 287 pp. *State Dept.*

———. Women's Auxiliary Committee of United States. 1917, 6 pp.

Passports. Executive order regarding verification of American passports and visa of foreign passports. May 11, 1917. (No. 2619.) *State Dept.*

Patents and trade-marks. Hearings on bills to authorize the Secretary of War or Secretary of the Navy to manufacture for use of Army, Navy, or people of the United States any drug, medicine, or other

remedy or device which is protected by patent or trade-mark, and which cannot be procured at reasonable price within United States. 1917. 52 pp. *Patents Committee*.

Prisoners of war, Custody of. (Special regulations 62.) 15 pp. *War Dept.*

Radio stations. Executive order taking over for Government stations necessary for naval communications and closing all others. (No. 2605A). April 30, 1917.

Roumania. Congratulations from Roumanian Chamber of Deputies to United States Government upon its entrance into the war. May 5, 1917. 2 pp. (H. doc. 121.)

Submarine cables, telegraph and telephone lines, Censorship of. Executive Order No. 2604. April 28, 1917. *State Dept.*

War. Rules of land warfare. 1914, corrected to April 15, 1917. 221 pp. (War Dept. doc. 467.) Fabrikoid, 50c.

War. United States at. Organizations and literature. 1917. 115 pp. Paper, 10c. *Bibliography Division, Library of Congress*.

War Risk Insurance Bureau, Act to amend act to authorize establishment of. Approved June 12, 1917. 4 pp. (Pub. 20.) 5c.

War with Germany. Address of President Wilson, Flag Day, June 14, 1917. 8 pp. *White House*.

———. How the war came to America. June 15, 1917. 46 pp. *Public Information Committee*.

———. War message and facts behind it, with annotations, giving leading facts on which rupture with Germany developed, issues in international law, and contrasting spirit of Prussianism and Americanism. 16 pp. *Public Information Committee*.

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

THE APPAM¹

Imperial Prize Court at Hamburg

May 11, 1916

In the Name of the Empire. — In the Prize Court proceedings relating to the British steamship *Appam*, owners: African Steamship Co., home port Liverpool, — and her cargo — The Imperial Prize Court at Hamburg, at its session of May 11, 1916, in which took part:

- | | |
|--|---------------------------|
| (1) Oberlandesgerichtspräsident Dr. Brandis, as President, | |
| (2) Mr. Nolze, merchant, | |
| (3) Captain Reincke, I. N. retired, | } as Assistant
Judges, |
| (4) Oberlandesgerichtsrat Dr. Lehmann, | |
| (5) Mr. Witthoeft, merchant, | |

rendered the following judgment:

The captured vessel and the cargo therein have been legally captured and are to be confiscated.

REASONS

The British steamship *Appam*, a merchant vessel, was captured on January 15, 1916, by H. M. S. *Möwe*, in the Atlantic Ocean and brought to Newport News. According to the ship's papers the vessel is of British nationality; proprietor is the African Steamship Company of Liverpool. The ship is registered at Liverpool. The steamship was on the voyage from Duala to Liverpool. Enemy vessels are subject to capture, according to P[rize] O[r]dinance] 10, and to confiscation, according to P. O. 17.

The cargo on board consisted of about 3000 tons of general cargo, including £36,549 gold in bars. According to the bills of lading, in

¹ Translation of certified copy of decision furnished by Department of State, Washington, D. C.

connection with P. O. 20, the entire cargo must be considered as enemy property and is subject to confiscation, according to P. O. 18.

In reply to the monition which, in accordance with the provisions of §26 P. G. O., was published on March 20, 1916, in the *Deutscher Reichsanzeiger* (Imperial German Gazette), for the entry of claims in respect of ship and cargo, nobody has applied within the stipulated period of six weeks. The application of the Imperial Commissioner has been made in accordance with P. G. O. 20.

Judgment had, accordingly, to be given as stated,

(signed) BRANDIS.

DR. K. LEHMANN.

For the proper copy:

Hamburg, May 11, 1916

(L. S.) Signature,

Secretary of the Imperial Prize Court.

Certified.

Berlin, May 17, 1916

[SEAL]

The Foreign Office of the German Empire.

By order:

90980.

(signed) KRIEGE.

Embassy of the United States of America, Berlin.

Seen for authentication of the foregoing signature.

This 18th day of May, 1916.

[SEAL]

(signed) ROLAND B. HARVEY,

Secretary of the Embassy.

THE "KRONPRINZESSIN CECILIE"¹*Supreme Court of the United States*

May 7, 1917

Mr. JUSTICE HOLMES delivered the opinion of the court.

This writ was granted to review two decrees that reversed decrees of the District Court dismissing libels against the *Steamship Kronprinzessin Cecilie*. 238 Fed. Rep. 668. 228 Fed. Rep. 946; 965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the outbreak of the present war. The question is whether the turning back was justified by the facts that we shall state.

The *Kronprinzessin Cecilie* was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and, we assume, governed by our law in respect of the justification set up. Early on July 28, she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1892 persons, of whom 667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 304, Americans; and two or three from Italy, Belgium, Holland, &c. She continued on her voyage until about 11.05 P.M., Greenwich time, July 31, when she turned back; being then in 46° 46' N. latitude and 30° 21' W. longitude from Greenwich and distant from Plymouth about 1070 nautical miles. At that moment the master knew that war had been declared by Austria against Servia (July 28), that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could, with coal enough to return if that should prove needful, and was

¹ The full title of this case, as carried on the docket, follows: "North German Lloyd, Claimant of the Steamship 'Kronprinzessin Cecilie,' Petitioner, vs. Guaranty Trust Company of New York and National City Bank of New York."

of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless message to the master: "War has broken out with England, France and Russia. Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 P.M., August 2, and 1 A.M. August 3, and would have delivered the gold destined for England to be forwarded to London by 6 A.M., August 3. On August 1 at 9.40 P.M., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered of the seizures, but the vessels were detained. The German Army entered Luxembourg, and there were skirmishes with French troops. On August 3 Germany was at war with France, and at 11 P.M., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, *e.g.*, *Prinz Adalbert* [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers or people," other exceptions necessarily are to be implied, at least unless the phrase "restrain of princes" be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine v. Jane*, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money) some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the

contractor would have assumed. *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor v. Caldwell*, 3 Best & Smith, 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman v. Pollard*, 43 Maine, 463. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England there can be no doubt that it would have been warranted in turning back. See *Mitsui & Co., Limited, v. Watts, Watts & Co., Limited*, [1916] 2 K. B. 826, 845. *The Styria*, 186 U. S. 1. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. *The Teutonia*, L. R. 4 P. C. 171. *The San Roman*, L. R. 5 P. C. 301, 307. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. *Oliver v. Maryland Insurance Co.*, 7 Cranch, 487, 493. *Craig v. United Insurance Co.*, 6 Johns, 226, 250, 253. See also *British & Foreign Marine Ins. Co., Limited, v. Samuel Sanday & Co.*, [1916] A. C. 650.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office if not a binding command at least shows that if the master had remained upon his course one day longer and had received the message it would have been his duty as a prudent man to turn back. But if he had waited till then there would have been a question whether his coal would hold out. Moreover if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although

a shipowner may give up his voyage to avoid capture after war is declared he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of the *Styria*, 186 U. S. 1, although not strictly in point, tends in the direction of the principles that we adopt.

Decree reversed.

Mr. Justice PITNEY and Mr. Justice CLARKE dissent, upon grounds expressed in the opinions delivered by Circuit Judges Dodge and Bingham in the Circuit Court of Appeals — 238 Fed. Rep. 668.

PEARSON ET AL. v. PARSON ET AL.

Circuit Court, E. D. Louisiana.

April 13, 1901

(108 Federal Reporter, p. 461)

In Equity. On motion for preliminary injunction.

The complainants are Samuel Pearson, a citizen of the South African Republic, Edward Van Ness, a citizen of the State of New York, and Charles D. Pierce, Consul General of the Orange Free State, whose citizenship is not set forth. In their original bill herein they aver, in substance: That the United States are at peace with the South African Republic and the Orange Free State, and that Great Britain is at war with the same. That complainants are owners of property situated in the South African Republic and the Orange Free State. That Great

Britain, by means of armies, seeks to destroy, and is now destroying the property of complainants. That, for the purpose of carrying on the war, the steamship *Anglo-Australian*, of which J. Parson is master, now lies in the port of New Orleans, and is being loaded with 1200 mules, worth \$150,000 by Parson, and by Elder, Dempster & Co., who are the agents for the ship, her owners and charterers, and who are represented by Robert Warriner and Matthew Warriner. All of the defendants are averred to be British subjects. That the steamship *Anglo-Australian* is employed in the war in the military service of Great Britain by her owners and charterers and by the defendants. That for some time past the defendants, in aid of the war, have loaded ships at New Orleans with munitions of war, viz., mules and horses, and have equipped ships with fittings for the purpose of carrying military supplies and munitions of war, for Great Britain, and have dispatched the ships, well knowing that the munitions of war and the ships are in the military service of Great Britain, and would be employed in the war. That the steamship *Anglo-Australian* is about to be dispatched by the defendants, loaded with mules and horses, being munitions of war, which are the property of the Government of Great Britain, and the same are to be employed in the military service of Great Britain. That the defendants are making the port of New Orleans the basis of military operations in aid of Great Britain in the war, and are using the port for the purpose of renewal and augmentation of the military supplies and arms of Great Britain in the war. That the defendants have caused and are causing complainants irreparable injury, in that their acts enable Great Britain to carry on the war with the South African Republic and Orange Free State, wherein are found the property of complainants, and that the army of Great Britain is enabled, by the means furnished by the defendants, to lay waste and destroy the farms and homes of complainants, and to hold as prisoners of war the wife and children of the complainant Pearson. That the complainant Pearson has already suffered loss of property to the amount of \$90,000, and is now threatened with further loss of \$100,000, by the acts complained of and the continuation of the war. That the war is only carried on by the renewal and augmentation of the military supplies of Great Britain from the ports of the United States and especially the port of New Orleans, and that when this ceases the war will end. That the defendants have conspired with certain agents and servants of Great Britain, whose names are unknown, to aid in the carrying on of the war, in the renewal and augmentation of the supplies of Great Britain and in the equipping with munitions of war and the dispatching of the ship *Anglo-Australian* and other vessels for the purpose of slaying the citizens of the South African Republic and the Orange Free State, and destroying their property, and more particularly to destroy and injure the property and rights of complainants, all in violation of and against the rights, privileges and immunities granted and secured to complainants by the law of nations and the constitution and laws of

the United States. The prayer of the original bill is, in substance, for an injunction prohibiting the defendants, their agents, servants, etc., from loading on the ship *Anglo-Australian*, or other vessels, munitions of war, viz., mules and horses destined for use by Great Britain in the war. A restraining order or temporary injunction in advance of a final injunction is also prayed for. By an amended and supplemental bill, the original complainants seek to also enjoin a shipment of mules and horses by the steamship *Monterey*, now in the port of New Orleans, under all the conditions and circumstances alleged in the original bill respecting the ship *Anglo-Australian*. The parties defendant in the amended and supplemental bill are the defendants to the original bill, and, in addition, Capt. Markham and Capt. Marshall, whose citizenship is averred to be unknown; the Anglo-American Steamship Company, whose citizenship is not averred, represented by Robert and Matthew Warriner, averred in the original bill to be British subjects; H. Parry, master of the steamship *Monterey*, whose citizenship is averred to be unknown; and William J. Hannon and Joseph J. Beranger, citizens of the State of Louisiana. The purpose intended to be subserved by the amended and supplemental bill seems to be to enjoin the shipment of mules and horses by the steamship *Monterey*, and to charge that Capt. Markham, Capt. Marshall, Hannon, and Beranger were among those who confederated and conspired with the defendants named in the original bill to do the acts therein complained of.

PARLANGE, District Judge (after stating the facts). It was conceded on the argument that the court has no jurisdiction of this cause *ratione personarum*. The complainants sought to maintain the jurisdiction *ratione materiae* by a claim of right under the Treaty of Washington of May 8, 1871, between Great Britain and the United States relative to the Alabama claims, in which treaty it is declared that:

A neutral government is bound . . . not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

The complainants contend that, by reason of this declaration of the treaty, they are entitled to invoke the equity powers of this court for the protection of their property. If the complainants could be heard to assert here rights personal to themselves in the treaty just mentioned, and if the mules and horses involved in this cause are munitions of war, all of which is disputed by the defendants, it would become necessary to determine whether the United States intended

by the above declaration of the treaty to subvert the well-established principle of international law that the private citizens of a neutral nation can lawfully sell supplies to belligerents. It is almost impossible to suppose, *a priori*, that the United States would have done so, and would have thus provided for the most serious and extensive derangement of and injury to the commerce of our citizens whenever two or more foreign nations should go to war; and it would seem that there is nothing in the treaty, especially when its history and purposes are considered, which would warrant the belief that the United States insisted upon inserting therein a new principle of international law, from which the greatest damage might result to the commerce of this country, and which was absolutely different from and antagonistic to the rule and policy which the government of this country had theretofore strenuously and invariably followed. The principle that neutral citizens may lawfully sell to belligerents has long since been settled in this country by the highest judicial authority. In the case of the *Sanctissima Trinidad*, 7 Wheat. 340, 5 L. Ed. 454, Mr. Justice Story, as the organ of the Supreme Court, said:

There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.

See also the case of *The Bermuda*, 3 Wall. 551, 18 L. Ed. 200.

16 Am. & Eng. Enc. Law (2d Ed.), p. 1161, verbiis "International Law," citing cases in support of the text says:

A neutral nation is, in general, bound not to furnish munitions of war to a belligerent, but there is no obligation upon it to prevent its subjects from doing so; and neutral subjects may freely sell at home to a belligerent purchaser, or carry to a belligerent power, arms and munitions of war, subject only to the possibility of their seizure as contraband while in transit.

Numerous other authorities on this point could be cited, if it was not deemed entirely unnecessary to do so.

The principle has been adhered to by the executive department of the government from the time when Mr. Jefferson was Secretary of State to the present day. Mr. Jefferson said in 1793:

Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings — the only means, perhaps, of their subsistence — because a war exists in foreign and

distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practise. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupation.

To the same effect are numerous other expressions and declarations of the executive department of the government from the earliest period of the country to the present time. See 3 Whart. Int. Law Dig. par. 391, tit. "Munitions of War."

Affidavits in the cause purport to show that the vessels which make the exportation of mules and horses of which the bills complain are private merchant vessels; that they are commanded by their usual officers, appointed and paid by the owners; that they are manned by their usual private crews, which are also paid by the owners; that they are not equipped for war; that they are not in the military service of Great Britain, nor controlled by the naval authorities of that nation; that they carry the mules and horses as they would carry any other cargo; and that the mules and horses are to be landed, not on the territory of the South African Republic or the Orange Free State, but in Cape Colony, which is territory belonging to Great Britain. If these affidavits set out the facts truly, it is difficult to see how a cause of complaint can arise. If a belligerent may come to this country and buy munitions of war, it seems clear that he may export them as freight in private merchant vessels, of his own or any other nationality, as cargo could be exported by the general public.

Another consideration in this cause is whether the allegations of threatened injury to the property rights of the complainants would in any case warrant the interposition of a court of equity. The theory of the complainants is that, if the injunction issues in this cause, the war will cease, but that, if these horses and mules are allowed to go to South Africa, the war will be carried on, and one of the results of its further prosecution will be the destruction of the complainants' property in South Africa. It is not claimed, of course, that the horses and mules are to be used specially to destroy the property of the complainants. In such cases as the present one, where the aid of equity is invoked to protect property rights, the injury apprehended must be a clear and reasonable one, proximately resulting from the act sought to be enjoined. The injury apprehended by the complainants from the shipping of the mules and horses seems

to be remote, indistinct, and entirely speculative. It seems clear that, even if this cause were within the cognizance of this court, there is herein no such connection of cause and effect between the shipment of the animals and the destruction of complainants' property as could sustain an averment of threatened irreparable injury, and that the averment that the war would cease if the shipments are stopped, which, in the nature of things, can only be an expression of opinion and hope concerning a matter hardly susceptible of proof, could not be made the basis for judicial action.

It may be well to notice that there is nothing in this cause upon which could be founded a charge that the neutrality statutes of the United States are being violated. A citation of authorities on this point is deemed unnecessary. While I apprehend fully that the complainants are not claiming through or because of the neutrality statutes, still it would seem that there exists at least a presumption that the United States have been careful to provide in those statutes for the punishment of every breach of neutrality recognized by this country.

But the nature of this cause is such that none of the considerations hereinabove set out need be decided, for the reason that a view of this case presents itself which is paramount to all its other aspects, and leads irresistibly to the conclusion that the rule *nisi* must be denied. That view is that the case is a political one, of which a court of equity can take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government. No precedent or authority has been cited to the court which, in its opinion, could even remotely sustain the cause of the complainants. No case has been cited, nor do I believe that any could have been cited, presenting issues similar to those of this cause. The three complainants are private citizens. It is true that the complainant Pierce avers that he is Consul General of the Orange Free State; but his demand is exclusively a personal one, and he must be deemed to be suing in his personal capacity. One of the complainants is an alien and a citizen of the Orange Free State. Only one of the complainants is alleged to be a citizen of the United States. They own property in the South African Republic and in the Orange Free State, foreign countries now at war with Great Britain. They fear that the war, if continued, will result in the destruction of their property. They believe that, if the shipments of mules and horses from this port are stopped, the war will

cease. They claim that, by virtue of a declaration of international law contained in an international treaty to which the foreign countries in which their property is situated were not parties, they have the personal right to enjoin the shipments for the purpose of stopping the war, and thus saving their property from the destruction which they apprehend will result to it from a continuation of the war. When complainants' cause is thus analyzed, and the nature of the alleged right under the treaty is considered, it is obvious that a court of equity cannot take cognizance of the cause. The main case relied on by the counsel for the complainants is the case of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217 (English Chancery Reports), in which the Emperor of Austria sought and obtained an injunction to restrain the manufacture in England of a large quantity of notes purporting to be receivable as money in, and to be guaranteed by, Hungary. That action was brought by the Emperor of Austria as the sovereign and representative of his nation, and the case turned and was decided on considerations entirely different from, and in no manner resembling, those presented in this cause. It may be worth noticing that the counsel for the Emperor of Austria freely conceded in the argument of the case that the exportation of munitions of war could not be enjoined. I am clearly of opinion that this cause is not within the cognizance of this court, and for that reason the rule *nisi* must be denied.

SAMUEL PEARSON *vs.* ALLIS-CHALMERS COMPANY ¹

Circuit Court, Milwaukee County, State of Wisconsin

May 29, 1915

STATEMENT OF FACTS

On the twenty-ninth day of April, 1915, the plaintiff, pursuant to the laws of the State of Wisconsin, caused to be issued by his attorneys, Messrs. Cochems and Wolfe, a summons in due form of law, commencing an action against Allis-Chalmers Company, a corporation, and Otto H. Falk, and certain unknown persons, and invoked the provisions of Section 4096 of the Revised Statutes of this State, commonly known as the "Discovery Statute," for the examination of the said Otto H. Falk, by giving him notice, accompanied by an

¹ Printed from certified copy of decision furnished by the Clerk of the Court.

affidavit, purporting to state the general nature and object of the action as required by said section of the statute. The notice set the examination for hearing before Mr. Adolph Kanneberg, a court commissioner of this county, for the fifth day of May, 1915, and the plaintiff caused the said summons, affidavit, and notice to be served upon the said defendant Falk, together with a subpoena issued by said commissioner, requiring the appearance of the said Otto H. Falk before said commissioner at the time and place stated, and that he bring with him and have at the time and place above named "all of the letters, correspondence, contracts and agreements, with the Bethlehem Steel Company" (presumably the contract or contracts referred to in the affidavit).

The examination is sought before pleading in the action. The statute permitting examination under such circumstances, so far as it is necessary to be here considered, reads:

If such examination shall be taken before issue joined, the notice of taking the same shall be accompanied by an affidavit of the party . . . stating the general nature and object of the action, that discovery is sought to enable the party to plead, and the points upon which such discovery is desired, and such examination shall be limited to the discovery of the facts relevant to such points.

The affidavit, so far as it is material, states:

That the plaintiff is a citizen of the United States of America, and that he has valuable property interests located within the boundaries of the German Empire. That he is the owner of securities issued by the German Government. That the German Empire is and for some time past has been engaged in war with the countries of Great Britain, France, Serbia, Montenegro, Russia and Japan; that great quantities of ammunition have been and will be consumed, and that one type of ammunition indispensable to the belligerents is a projectile known as shrapnel shell, which is designed for but one purpose, and that is the destruction of human life and property, and "that the intent of the war now being conducted by said aforementioned countries against the German Empire is to so cripple said empire by the destruction of the lives of its citizens and its property, both public and private, as to compel the submission of said empire to the future disposition of its national domain or to surrender of its sovereign life as said allies, if victorious, may dispose."

The affidavit refers to the proclamation of the President of the United States upon the breaking out of the war, asserts that the provisions of Sections 5281 to 5291 of the Revised Statutes of the United States manifest the spirit of moral obligation incumbent upon the citizens of the United States as a neutral power toward the belligerents, and that said moral standards of conduct are further established by a

firmly fixed principle of international law, under which, if the United States Government sold munitions of war to either of the belligerents, said act would constitute an act of unneutrality and would involve the United States in war with the offended party. It further alleges that said moral standpoint is, moreover, fixed as between nations by the fact that every neutral Power of the first rank in the world has forbidden the exportation of munitions of war to the belligerents, and in many instances, have forbidden the transport of munitions of war over their territory to belligerent nations. "Said moral standpoint is, moreover, fixed by the common judgment and consent of all men. That if arms and ammunition were withheld by the United States from either of the belligerents, the operations of said belligerents, resulting in wholesale bloodshed and taking of life and vast destruction of property, would be promptly curtailed and the duration of the war shortened."

It further alleges, upon information and belief, that the shell manufactured by the defendant is transported, under the direction of the Bethlehem Steel Company, of Pennsylvania, to the countries hostile to Germany, and that a contract exists between the defendant and the Bethlehem Steel Company.

And it further alleges, upon information and belief, "that the above named defendants entered into an agreement, contract and conspiracy with said Bethlehem Steel Company and with other persons as yet unknown to plaintiff for the purpose of carrying out said grossly immoral act. That as a result of said conspiracy and acts of said defendants and their co-conspirators, said defendants are menacing the financial integrity of said German Empire, and are destroying the value of said plaintiff's property, interests and holdings in said empire, not only by general destruction of property values directly resulting from said acts of said conspirators, but by endangering the physical destruction of said property of said plaintiff, which loss and destruction will be irreparable." That the defendant was not, before the war, engaged in the manufacture of war material; that the conspiracy indicated is made criminal by Section 4568 of the Wisconsin Statutes.

The points upon which the plaintiff seeks discovery are as follows:

1. The names of each and every person or corporation with whom said defendants, or either of them, have contracted for the manufacture of shrapnel shell or similar munitions of arms.

2. The extent and nature of such contracts.
3. The names of consignees of shipments of said shrapnel shell.
4. The exact undertakings of said defendants, and each of them, in pursuance of the agreement hereinbefore mentioned.
5. The motive, as to whether it be immoral or otherwise, of said defendants in said conspiracy.
6. The knowledge of said defendants, or otherwise, as to whether said shrapnel is a violation of any of the sections of the federal statutes referred to in this affidavit.

On the fourth day of May, 1915, the defendant Falk obtained an order to show cause, returnable on the eighteenth day of May, 1915, why the examination of the said Falk should not be perpetually stayed and the action dismissed. The appearance of said Falk was special, for the purpose only of obtaining the relief prayed for in the order to show cause.

Said affidavit sets forth the following facts and contentions of the defendant:

1. That the affidavit of Pearson does not show facts constituting a cause of action.
2. That it affirmatively appears therefrom that Pearson has no cause of action against the defendants, or either of them.
3. That the defendant is charged with the commission of the crime of conspiracy with the Bethlehem Steel Company and others, in violation of the statutes of the United States and the statutes of the State of Wisconsin.
4. That, being so charged, he cannot be examined under the laws of the United States or the State of Wisconsin for the purpose of establishing such conspiracy or of ascertaining facts upon which to base such charge of criminal conspiracy.
5. That he cannot, under the laws of the United States or the State of Wisconsin (being charged with such criminal conspiracy) be required to produce the papers mentioned in the subpoena — namely: all of the letters, correspondence, contracts, agreements with the Bethlehem Steel Company, or any other papers bearing upon the subject matter thereof, for the purpose of establishing such conspiracy, or ascertaining facts or information upon which to base such charges of criminal conspiracy against him.
6. That the subpoena is void and was illegally issued.
7. That the Circuit Court of Milwaukee County is without jurisdiction to entertain the subject matter of this suit or the proceeding for the examination of the deponent and the production and examination of the papers, documents, or other matters required under the subpoena.
8. That the court commissioner is without power or jurisdiction to entertain, hear, and conduct the examination and compel the production of papers, documents, *et cetera*.
9. That the proceedings for the examination of the defendant are contrary to and in violation of the Constitution of the United States and of the State of Wisconsin.

10. That the proceedings and subpoenas issued by the commissioner for the production of all letters, correspondence, contracts and agreements, with the Bethlehem Steel Company are in violation of and contrary to the Constitution of the United States, and especially of the fourth and fourteenth amendments, and contrary to the Constitution of the State of Wisconsin.

OPINION

Upon the argument of this case it was conceded by the plaintiff that the relief sought by him is a judgment in equity restraining the defendants from selling munitions of war to the belligerents who are at present at war with the Empire of Germany. As stated by the counsel for the plaintiff, "*Mr. Pearson is here as a private individual, pursuing a private right for a distinctly wrongful act threatening damage to him.*"

The functions of the three branches of the Government of the United States, and of the several States, are clearly defined and well understood. The plaintiff seeks the aid of the court (the judicial branch) to restrain the defendants from executing a contract to manufacture for the Bethlehem Steel Company articles which are contraband of war, claimed to be intended for shipment to a belligerent opposed to the German Empire.

I know of no rule of equity which would justify a court, at the suit of one citizen of the United States against another citizen, to enjoin the carrying out of a contract which such other citizen has to manufacture and sell munitions of war intended for the use of one of the adversaries in the pending conflict (this country being neutral as to all of the contending nations), if the right of the individual citizens of this country to manufacture and sell implements of war to all of the belligerents is recognized by both the executive and legislative branches of the government.

It was contended upon the argument that if the questions involved are entirely political, the power to deal with the same is not vested in the judicial branch of the government, but rests with the executive branch. This being so, *the contention of the plaintiff, to be successful, must rest upon a pecuniary loss sustained by him by reason of the sale by a citizen of the United States of munitions of war to the belligerents.*

Treaties between the belligerents, or either of them, and this country, and the general rules of international law, must be recognized by the courts, and the courts must give force to the same when applicable in controversies pending therein. The rights of neutral countries

and of the citizens of the neutral countries have been the subject of treaties between the United States and the German Empire and its predecessors for more than one hundred years. These rights have been regarded by this and foreign countries as properly the subject of treaties between these countries, enforceable by a citizen, so far as this government is concerned, through the executive department.

The only time that the jurisdiction of a court was invoked in a contest of the nature here presented is the suit by this same plaintiff during the "Boer War," *Pearson et al. vs. Parson et al.* (E. D. Louisiana) 108 Federal Reporter, 461. The plaintiff in this action was not then a citizen of the United States, but he joined with him in the suit in Louisiana, as plaintiff, a citizen of the United States. The suit was to restrain the defendants from shipping horses and mules, which were contraband of war, to be used by Great Britain in the war then pending between the South African Republic and Orange Free State.

The plaintiff maintained in that suit that he was a citizen of the Orange Free State; had property therein; that if munitions of war were sold by citizens of the United States to Great Britain it would prolong the war, and his property be depreciated in value, and he be thereby caused pecuniary loss.

The court agrees with the decision of the federal court of Louisiana, above referred to, so far as it relates to the nature of the action, and what it there says with reference to that subject so clearly gives the reason for such conclusion that it is here quoted:

But the nature of this cause is such that none of the considerations hereinabove set out need be decided, for the reason that a view of this case presents itself which is paramount to all other aspects and leads irresistibly to the conclusion that the rule *nisi* must be denied.

That view is that the case is a political one of which a court of equity can take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government. (p. 464.)

The present war is as abhorrent to the writer as it is to any other humane person, and he heartily approves of all efforts that may be made by this or any other government to cause a speedy termination thereof. But, as a judge of a court, he is called upon to ascertain and declare the law as he believes it to be. All of the treaties between the United States and the belligerents and other countries recognize the legal existence of a state of war, and provide rules of conduct for bel-

ligerents and neutrals when such condition exists. It is to be hoped that the reason for such rules will soon cease, and that all civilized countries will recognize that between nations there should be a judicial settlement of international disputes.

In 1785 this country concluded a treaty with Prussia. By Article XII it is provided:

If one of the contracting parties should be engaged in war with any other power the free intercourse of commerce of the subjects or citizens of the party remaining neutral with the belligerent power shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch as all things shall be adjudged free as shall be on board any vessel belonging to the neutral party although such things belong to an enemy of the other.

A further treaty was concluded between the United States and Prussia in 1799. Article XIII thereof contains the following:

And in the same case of one of the contracting parties being engaged in war with any other power, to prevent the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, munitions, and military stores of every kind, no such articles carried in the vessels or by the subjects or the citizens of either party to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue by their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors, and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained at the current prices at the place of its destination. — Senate Document No. 48, p. 1490. Sixty-first Congress, second session.

In 1828 a "treaty of commerce and navigation" was concluded. This treaty adopted Article XII of the treaty of 1785 and Articles XIII to XXIV, inclusive, of the treaty of 1799.

In the Second Hague Convention, 1907, to which Germany and the United States were parties, by Article VII, "a neutral Power is not called upon to prevent the export or transport on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or fleet." Senate Document, Vol. 48, p. 2298, 61st Congress, 2d session.

The proclamation of President Wilson at the commencement of

hostilities between the present belligerents calls the attention of the citizens of the United States to their rights and liabilities in the present war, and to the duty of the government. It particularly refers to the Penal Code of the United States and to the penalties which will follow upon a violation thereof by its citizens. In the preamble is the following:

And Whereas, the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless imposes upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And Whereas, it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war.

In the proclamation he says:

And I do further declare and proclaim that the statutes and the treaties of the United States and the laws of nations alike require that no person within the territory and jurisdiction of the United States shall take part, directly or indirectly, in said wars, but shall remain at peace with all of said belligerents, and shall maintain a strict and neutral impartiality.

And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction, that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent cannot lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the *aforesaid state of war*, manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as contraband of war (the italics are by the writer), yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained, during the said wars, without incurring risk of hostile capture and the penalties denounced by the law of nations in that behalf.

This proclamation contains a definite and plain summary of the law as it exists to-day, defining the lawful rights and duties of citizens of the United States so far as it relates to their intercourse and dealing with the belligerents. It expressly recognizes the right of any such citizen to ship contraband of war to any of the belligerents at the risk of the shipper.

The Congress has made certain acts of the citizen "*offenses against neutrality.*"

Chapter 2 of the Penal Code, R. S. 5281, *et seq.*

As summarized by titles in the chapter, these acts are as follows:

- (a) Accepting a foreign commission.
- (b) Enlisting in foreign service.
- (c) Arming vessels against people at peace with the United States.
- (d) Augmenting the force of foreign vessels of war.
- (e) Military expeditions against people at peace with the United States.

The act of selling contraband of war to a belligerent is not made an offense by these statutes.

Writers upon international law agree that the neutral nation must be absolutely impartial in its dealings with all of the belligerents. It cannot be better stated than as follows:

By the usual principles of international law, the state of neutrality recognizes the cause of both parties to the contest as *just* — that is, it avoids all consideration of the merits of the contest. The idea of a neutral nation implies two nations at war and a third in friendship with both. — Moore's International Law Digest, Vol. VII, p. 860.

Mr. Moore, in the same work and same volume, collects the state papers on the subject of the right of a private person to sell contraband of war to belligerents (p. 955). The Secretaries of State and other Cabinet officials from 1793 to the present day, whenever they have had occasion to speak upon the subject, have always recognized the right of citizens to manufacture and sell the same to belligerents.

In 1793 Mr. Jefferson said: "Our citizens have been always free to make, vend, and export arms."

In Hamilton's treasury circular, Aug. 4, 1793, he speaks as follows:

The purchasing within and exporting from the United States *by way of merchandise* articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war and is not to be interfered with.

Mr. Pickering, Secretary of State, in 1796, said:

In both sections cited (110 and 113 Vattel) the right of neutrals to trade in articles contraband of war is clearly established; in the first, by selling to the warring powers who come to the neutral country to buy them; in the second, by the neutral subjects or citizens carrying them to the countries of the powers at war and there selling them.

Wheaton's *Elements of International law*, edition of 1904, page 671, says:

Some writers, overlooking the fact that a neutral has rights as well as a belligerent, have laid down the doctrine that the exportation of contraband is a breach of neutrality. This opinion has generally been adopted only by those whose views of international law have been derived purely from speculation. The practice of nations in no way bears out such an assertion. In every war neutrals have traded in contraband, but with the risk of having the goods condemned if captured by the enemy. Few rules of international law are so certain as that a neutral government cannot be made responsible as for a breach of neutrality because its subjects carry on a contraband trade. Thus Bismarck chose to protest more than once during the Franco-Prussian war against the supplies of arms and munitions procured in England by the government of the French republic. The trade must, however, be confined to subjects. If carried on by the government itself it then will amount to a violation of neutral duties. America has always maintained the right of exporting arms to belligerents in the way of trade; and during the civil war the federal government purchased warlike stores from England to the value of over £2,000,000.

It might be added that during that war the Southern Confederacy likewise purchased arms and munitions from England. The Federal Government during the same war purchased arms and munitions of war from France, Germany and Austria. It is a fact also that during most of the wars of the past century citizens of neutral countries have, without hindrance by their governments, sold arms and other munitions of war usually to all the belligerents.

In 1855 Franklin Pierce, then President of the United States, had occasion to speak upon this subject in his message to Congress. Messages and Documents, Part 1, 1855-56, page 6. There was then pending war between Great Britain and Russia.

It is the traditional and settled policy of the United States to maintain impartial neutrality during the wars which from time to time occur among the great powers of the world. . . . Notwithstanding the existence of such hostilities, our citizens retain the individual right to maintain all their accustomed pursuits, by land or by sea, at home or abroad, subject only to such restriction in their alteration as the laws of war, the usage of nations, or special treaties may impose. . . . In pursuance of this policy the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility therefor, sold gun-powder and arms to all buyers, regardless of the destination of these articles.

It is interesting and instructive to note in what a strenuous manner both the Federal Government and the Confederate States sought to supply themselves with arms and munitions purchased from the citizens of most of the countries now engaged in war.

British Counter Case, Tribunal of Arbitration at Geneva, Vol II, pages 70 to 83 inclusive.

Further references to writers upon this subject and to public documents would unduly prolong this opinion.

The right to manufacture and sell to belligerents by a citizen of a neutral country is universally recognized. Though we may all hope that the time is near at hand when war will be no more between civilized nations, yet we must recognize that at the present time war for the settlement of international disputes is legal. Most of the treaties and conventions between the nations have only gone so far as to promulgate rules to ameliorate conditions brought about by a state of war and the suffering of those stricken in war, all, in effect, being in recognition of the right to make war for the settlement of international disputes.

In this connection it should be borne in mind that very recently this subject has been one of controversy between the United States and Germany. It will be recollected that Germany vigorously protested against the United States Government permitting its subjects to manufacture, sell, and deliver munitions of war to the allies. On the twenty-second of April of this year (1915) Secretary of State William Jennings Bryan replied to the claims of the German Government, and to its protests against the subjects of the United States furnishing munitions of war to the allies in the following manner:

In the third place I note with sincere regret that in discussing the sale and exportation of arms by citizens of the United States to the enemies of Germany, your excellency seems to be under the impression that it was within the choice of the government of the United States, notwithstanding its professed neutrality and its diligent effort to maintain it in other particulars, to inhibit this trade, and that its failure to do so was manifestly an unfair attitude toward Germany. This government holds, as I believe your excellency is well aware, and as it is constrained to hold in view of the present undisputed doctrine of accepted international law, that any change in its own laws of neutrality during the progress of a war which would affect unequally the relations of the United States with the nations at war, would be an unjustifiable departure from the principles of strict neutrality by which it has consistently sought to direct its actions, and I respectfully submit that none of the circumstances mentioned in your excellency's memorandum alters the principles involved. *The placing of an embargo on the trade in arms at the present time*

would constitute such a change and be a direct violation of the neutrality of the United States. It will, I feel assured, be clear to your excellency that, holding this view and considering itself in honor bound by it, it is out of the question for this government to consider such a course.

In view of the well-settled principles of international law, it must be apparent that the relief sought by the plaintiff herein is "political rather than legal," and for this court to grant the relief sought would be to entertain jurisdiction upon a matter exclusively within the political and executive branch of the federal government.

The distinction between a civil and criminal action for conspiracy is that in a civil action for damages instituted against members of conspiracies, the gist of the action is the damage; while in a criminal prosecution for the offense of conspiring, the gist of the action is the conspiracy. The general definition of a conspiracy is that it is a combination of two or more persons to do a criminal or unlawful act, or to do a lawful act by criminal or unlawful means. — *Martens vs. Reilly et al.*, 109 Wis., 464.

In the same case it is said "the word 'unlawful' is not confined to criminal acts; it includes the wilful *actionable* violation of civil rights."

As bearing upon the contention of the learned counsel for the plaintiff that if the act of the defendants was immoral, even though not criminal, still the plaintiff can recover in the action, the court directs attention to the following quotation from a recent decision of the Supreme Court of this State, several times repeated in prior decisions:

An act legal in itself, in that it does not offend against the criminal law, and the injuries are *damnum absque injuria*, regardless of its violation of moral standards, whether such act be the one perpetrated or the means used to that end, generally, if not the subject of a civil action for damages when done by one person, is not if done by many acting in concert. *Gebhardt vs. Holmes*, 149 Wis., 428, p. 444.

Since the oral argument of the case, additional briefs have been filed by the plaintiff's attorney and other counsel. In one of the briefs the court finds this statement as to the nature of the decision called for from the court by the suit of the plaintiff, in the following language:

A favorable decision in the interest of the plaintiff in this case will mean more than a mere protection of the individual property rights of the plaintiff; and it can readily be seen that the object and purpose of this litigation is not solely for the purpose of conserving dollars and cents, but that it is for the purpose of saving human life and human limb and to bring about a speedy termination of this terrible conflict.

Repeatedly in the oral argument and in his brief, the learned counsel for the plaintiff in this case states that the plaintiff brings this action to protect himself from *pecuniary loss*, and that upon any other theory he cannot maintain his action. Both the plaintiff's attorneys and the counsel who is with him upon the brief are too eminent in their profession to seriously contend that the court (the judicial branch of the government) is vested with power and authority to modify treaties and rules of international law; yet they insist that this court should decide this application in favor of the plaintiff as furthering the objects and purposes of the litigation "to bring about a speedy termination of this terrible conflict."

To grant the relief sought by the plaintiff is to judicially interfere with the defendant exercising a commercial right, political in its nature and expressly recognized and protected by the executive department of our government. The division of this government into the legislative, executive and judicial departments is a distinguishing feature of our American policy, and it is essential to its existence that each of these departments shall be independent of the other. This is fundamental and organic. It would be just as dangerous to its stability for the judicial department to override the others as for the executive or the legislative departments so to do. The end sought to be obtained by this plaintiff is admittedly to enjoin the defendant from the exercise of a right not in any sense appertaining to him as a citizen of this country. The right of the defendant as a subject of the United States to manufacture and sell contraband articles, with the risk of having the goods condemned if captured, has been recognized by all the nations of the earth since the administration of President Washington, as a practice violative of neither the laws of nations nor the standards of neutrality. The right of neutral individuals to trade with any of the belligerents is a question dealing primarily with privileges recognized and prescribed by the tenets of international law, the performance, regulation and protection of which *rests solely with the executive department*. If the judiciary, even remotely or indirectly, should invade the field of any such right, it would thereby interfere with, if not deny, to the subjects of this country the exercise of those prerogatives which are expressly guaranteed to them through the executive department. If the judiciary could, by the exercise of any jurisdiction, grant the relief, directly or indirectly, which is ultimately prayed for in the case at bar, then its decree would be, in effect, a judicial man-

date to the executive department of our government that it may deny to the people of this country the enjoyment, as well as the exercise, of those political privileges which, from time immemorial, have been guaranteed by the nations of the earth to the subjects of every neutral state.

In the discharge of their duties courts must religiously confine themselves to the exercise of the judicial function, irrespective of whether the result reached squares with the court's view of national or international morality, or the judge's personal view of public or private sentiment. If the principles of international law, the commands of treaties, which are the law of the land, or the constitutional limitations placed upon the judiciary under our form of government, be regarded as vicious, confusing or embarrassing, the remedy must be sought elsewhere than in the courts.

As illustrating these general principles that each department of our government has the right to administer the duties imposed upon it, I refer to *Mississippi vs. Johnson*, 4 Wallace 475, which was a bill to enjoin the President of the United States and the Secretary of War from carrying into effect in the State of Mississippi certain "noxious provisions" of the Reconstruction Act of 1867. The Supreme Court of the United States, after denying that it possessed any jurisdiction to enjoin the President in the performance of an executive and political duty, speaking through Mr. Chief Justice Chase, used the following terse and applicable expression:

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the president might be justly characterized in the language of Chief Justice Marshall as "an absurd and excessive extravagance."

Counsel for the plaintiff readily conceded upon the argument that unless there is actionable wrong done or threatened by the defendant, no action in equity exists. War, to-day, is recognized by all nations, as a legal act, when it is declared and conducted according to the rules of international law. When nations of the earth are ready to condemn war and accept the decision of an international court in lieu thereof, then the principle here urged by the plaintiff will become one of the governing rules of man, and any one thereafter engaged in committing or furthering a state of war will be doing an act prohibited by the law of nations. It, therefore, follows that citizens of a neutral govern-

ment who have the right to trade with a belligerent and furnish arms and munitions of war, cannot be said to be engaged in doing an unlawful and immoral act in view of the well recognized fact that for so many years such conduct has been recognized and permitted by treaty and well settled principles of international law. It is the convention of nations that makes international law, and not the wishes or decisions of the courts. The courts have the duty of construing the rules, as laid down by the nations in their conventions, out of which arise the principles governing them in their relations with each other; but the courts cannot, in the face of the well settled principles of international law as here indicated, hold or conclude that the doing by a citizen of an act which the executive branch of the government recognizes in the light of the law of nations to be legal and lawful, is an unlawful and immoral act of such a character as to give rise to that species of actionable wrong without which the jurisdiction of a court of equity cannot attach.

Passing the proposition that upon the facts stated the plaintiff has a complete and adequate remedy at law if it appears that he has sustained an actionable wrong, we must inquire whether the facts which he alleges to exist constitute a cause of action in equity. Counsel has argued with great force that the act of war is an immoral act, that a conspiracy to aid an immoral act may be made the foundation of a suit to prevent its commission. He has described with graphic power the horrors of war, and appealed to the higher instincts of man, with which sentiments this court, together with the great body of the American people agree.

Again, it is a rule of law which governs both an action in equity and an action at law in this state, that one who seeks to recover for a conspiracy must show that he has sustained damage; that the damage which he has sustained is the proximate result of the acts or threatened acts of the defendant.

The plaintiff, a citizen of the United States, maintains in his affidavit that he is the owner of securities of the German Empire; that, if the war continues, his securities will diminish in value, and that the furnishing of shrapnel shell to the countries at war with Germany will cause prolongation of the war, and depreciation of his securities, and consequent loss to him. The mere statement of the fact seems to the court an answer to the contention of the plaintiff. In such a case as the present one, *where the aid of equity is invoked to protect property*

rights, the injury apprehended must be a clear and reasonable one, proximately resulting from the act sought to be enjoined. The injury apprehended seems to be remote, indistinct, and entirely speculative. When an injury may be said to be the proximate cause of the damage to another has been many times defined by the Supreme Court of the State of Wisconsin. The allegations of this affidavit fall far short of showing such casual connection between the injury complained of and the damages apprehended by the plaintiff.

The allegation that the war would cease if the shipment of shrapnel shell is stopped is only an expression of opinion, hope, or expectation, and is not susceptible of proof, and cannot be made the basis of judicial action.

In order that this court may interfere to prevent the examination of the defendant, it must appear from the facts stated in the affidavit that the plaintiff has no cause of action against the defendants; in other words, the affidavit is not required to state a cause of action, but if it appears from it that he may have a cause of action, the court cannot restrain the examination.

In view of the decision of the Supreme Court of Wisconsin, in *State vs. T. M. E. R. and L. Co.*, 136 Wis., 179-192, holding that "the courts . . . when the futility of the alleged attempt to institute a suit is manifest, should not only prevent an examination but should dismiss the ostensible actions," it therefore becomes the duty of the court here, in view of the conclusion reached, to prohibit the examination and direct the dismissal of the action.

Dated, Milwaukee, Wis., May 29, 1915.

By the court:

W. J. TURNER,
Circuit Judge.

BOOK REVIEWS AND NOTES

La Liberté des Mers. Le Blocus de l'Allemagne. La Guerre Sous-Marine. By Dr. R. de Villeneuve — Trans. Paris: A. Pedone. 1917. pp. 103.

Though the exact date is not mentioned, this book seems to have been written but a few weeks prior to the entry of the United States into the great European conflict. One would conclude from the author's introduction that his purpose was to discuss the "freedom of the seas" in order to determine how far the doctrine in its heretofore generally accepted significance does or does not conform to the sense in which it has been employed in Germany by Bethmann-Hollweg and others. But the author, while sensing a divergence, does not greatly enlighten us upon its nature or probable causes. He leads us through a brief history of attempted preëmptions of parts of the seas in past times, in peace and war, and discusses the developments of the rules of blockade and contraband down to and including the Second Hague Conference and the Declaration of London. He then outlines chronologically the steps taken in the present war for the blockade of the enemy by the various belligerents and discusses in the light of previously accepted international law the British Orders in Council and the proclamations of the German Government.

His conclusions condemn the German submarine warfare conducted against neutrals and belligerents alike as simple piracy. This leads him to consider the official attitude of the United States, the one powerful neutral yet remaining at the time. He condemns the successive notes of President Wilson, however laudable in motive, upon the sinking of the *Lusitania* and the *Sussex*, because based too generally upon the undefined principles of justice and humanity rather than upon the precise texts and accepted rules of international law.

The purely legal questions are discussed with clarity and understanding, but unfortunately the author leads his argument into a general indictment against the United States for its failure to participate on the side of the Allies. This part of the book is considerably marred by some

glaring inaccuracies. One wonders, for example, where the author could have derived the information that among 18,000 newspapers and periodicals published annually in the United States, about one-third are published in the German language. Perhaps if he had waited a few weeks longer, his divagations upon "*Le peuple américain*" (p. 98) might have been more generous.

ARTHUR K. KUHN.

Resolutions of the Institute of International Law dealing with the Law of Nations. With an Historical Introduction and Explanatory Notes. Collected and translated by the Division of International Law of the Carnegie Endowment for International Peace, under the supervision of and edited by James Brown Scott, Director. New York: Oxford University Press. 1916. pp. xlv, 265.

The nature and influence of the Institute of International Law are such as to render it of utmost importance that the fruits of its labors be brought within the reach of all who claim an interest in the growth and evolution of the law of nations. Inasmuch as copies of the proceedings of that body are not numerous, and hence not generally to be found on the shelves of American libraries, the Carnegie Endowment has performed a distinct service for American lawyers, teachers, and students, in making generally available the texts, and that in English, of the several resolutions of the Institute. The function of the compilation is something more than to serve as an agency in popularizing international law, and of encouraging a wider study of it. It is rather to bring home to those working in that field a better means of observing what a unique body of scientific men, representative of all enlightened states, and possessed of ripe learning and large experience in dealing with foreign affairs, deems to be the requirements of international justice. The weight of their conclusions has already been felt by statesmen and jurists, a circumstance which the editor has dwelt upon at length in his interesting preface. They deserve, however, to be much more widely examined and discussed by intelligent and competent opinion, a body of which exists in America as elsewhere. The present volume offers such an opportunity. It may prove, moreover, the means of producing broader and more thorough study of the Oxford Manual of Naval War adopted by the Institute in 1913, a document

which, by reason of occurrences of the present war, merits close examination.

The compilation contains, in addition to an historical introduction (translated from the *Tableau général* issued in 1894), the constitution and by-laws of the Institute, a list of members and associates thereof, past and present, and the several resolutions of the Institute dealing with the law of nations. There is added an appendix of fifty-four pages containing the original project and report of Mr. Goldschmidt of June 20, 1874, on International Arbitral Procedure, supplementary observations by him of July 30, 1875, relative to the Regulations for International Tribunals, Mr. Fauchille's project of a Convention Respecting Aërial Law, of 1911, the Code on Aircraft in War proposed by Mr. von Bar, and the Regulations Governing the Relations between the Carnegie Endowment and the Institute, as well as an index.

Preliminary to the text of each resolution, the editor has given a brief but useful sketch of the history thereof in the various sessions of the Institute, with full references to the *Annuaire*.

It is believed that in work of this character, that is, in giving broader circulation to documents relative to international law and emanating from authoritative sources, this Division of the Carnegie Endowment renders its finest public service. It is fortunate that the significance of it has not been lost sight of by the Director and his staff.

CHARLES CHENEY HYDE.

The Destruction of Merchant Ships under International Law. By Sir Frederick Smith. New York: E. P. Dutton and Company. 1917. pp. 110.

The author of more than one valuable treatise on international law, and now holding the office of Attorney-General of Great Britain, has undertaken to set forth in brief compass the law upon a subject which, together with contraband and blockade, has been the very center of belligerent and neutral controversy in the present war, and which has been the immediate occasion of forcing the greatest of the neutral nations to abandon its neutrality and to resort to that force of arms which is the ultimate arbiter of violated law. If it be thought that under such circumstances further discussion of the law might have been left to a period of calmer judgments, the author anticipates our

objection with the suggestion that his presentation of the question may "enable those who suffer from the present Reign of Terror to understand and formulate their legal grievance" in the hope of a day of retribution to come.

The subject is arranged under the headings of enemy merchantmen and neutral merchantmen, which enables the author to present the case of neutral ships with the force of an *a fortiori* argument. In neither case is the question limited to the destruction of ships after peaceful capture, but, in addition, the author discusses the necessity of visit and search and the penalties of resistance thereto. In the case of enemy merchantmen it is shown that, on the one hand, belligerent warships may not dispense with visit and search, and, on the other hand, the merchantmen have the right to evade search and to defend themselves against attack, subject, of course, to the exercise of the full force of the enemy to bring them to submission. This right of resistance, which includes the right of the merchantman to carry a defensive armament, raises the issue of the attack upon merchant ships by submarines without warning, and the conclusion reached by the author is that the danger to the submarine of exposing itself to attack, by following the normal procedure of visit and search, and the lack of facilities for the safe removal of passengers, do not justify the submarine in violating existing law.

No better summary of the law within this limited field could be given, and the nationality and official position of the author would never be suspected from the impartial way in which the issues are handled. The volume still leaves, however, several questions unsettled. It is marked by a tendency to cling to the old law without sufficient consideration of the changed circumstances of modern wars. For example, the author's conclusion that "the use of submarines against commerce must necessarily remain illegal until international law has made express provision for their employment" is a stern verdict, though one to which the United States has also given its approval. Was there not room to consider whether the circumstances of naval wars before the abolition of privateering had not so completely changed as to render illogical the carrying of armament by merchantmen for defensive purposes? Likewise the conclusions reached with regard to the destruction of neutral merchantmen are not altogether convincing. It is doubtful whether there was any "customary law" to fall back upon when the provisions of the Declaration of London remained unratified. The practice of the

past, especially at a time when there was no great temptation to destroy neutral ships, cannot be said to constitute a law in the face of the express repudiation by Russia, Germany, and other Powers of the rule of nondestruction at the Second Hague Conference and the London Naval Conference. Customary law rests upon implied consent, which must yield before express dissent.

The volume contains references to the judicial cases in point, including a dozen or more of the cases that have arisen during the present war, while the references in the footnotes to the literature of the questions discussed will prove of use to the student in pursuing the subject further.

C. G. FENWICK.

Official Diplomatic Documents Relating to the Outbreak of the European War. With photographic reproductions of official editions of the documents (Blue, White, Yellow, etc., books) published by the Governments of Austria-Hungary, Belgium, France, Germany, Great Britain, Russia, and Serbia, — Introduction, Daily Summaries, Cross-references and Foot-notes by Edmond von Mach, A.B., A.M., Ph.D. (Harvard). New York: The Macmillan Company. 1916. pp. xxii, 608, with appendix.

In his very interesting and suggestive introduction, Dr. von Mach discusses the value of the various multi-colored diplomatic books published at the outbreak of the war and reaches the conclusion, with which the reviewer is in agreement, that "by a judicious comparison of all . . . an impartial observer may come very near to understanding the truth." He states his "wish to prepare a serviceable source book, not for partisans, but for scholars and intelligent readers," observing that "he has cracked the nut, as it were, that the kernel of truth might lie revealed," and that "his greatest reward therefore will be if scholars agree that he has succeeded in keeping prejudice out of the book, being fair to all and preparing that most necessary of all helps to a scholar, a reliable source book." To keep prejudice out of any book dealing with the diplomatic documents relating to the war, or any review of any book dealing with these documents, is a most difficult task. Entirely aside from national bias, no intelligent man can study these documents carefully enough to justify his writing about them without coming to some very definite conclusions one way or the other,

and having come to these conclusions, it is extremely easy to play up the facts which seem to him to support them, and overlook or unduly minimize other facts which may be thought to point in a contrary direction — and this without any intention to be unfair.

The present reviewer cheerfully admits on the threshold that he came to Dr. von Mach's book equipped from his own first hand study of the documents with a full set of opinions diametrically opposed to those entertained by Dr. von Mach as set forth in Dr. von Mach's writings prior to the present volume. After this confession of his own predisposition, the reviewer feels free to say that in his judgment, while the compilation which Dr. von Mach has produced will be in many ways useful to the student of the diplomatic documents, he has conspicuously failed in his announced purpose to "keep prejudice out of the book."

The most useful thing about the volume is its arrangement, the multi-colored "books" issued by the different governments being broken up and the despatches printed chronologically according to their dates "and within the dates according to the alphabetical order of the countries which sent or received them." Everyone who has dealt seriously with the documents must have made this chronological arrangement at least mentally for himself, and it is a comfort and convenience to have it made physically. The despatches of each day, with two or three exceptions when few despatches appeared, are preceded by a brief summary of the diplomatic exchanges of that date, and are supplied with elaborate notes consisting of cross-references, explanations, suggestions, etc., etc. This system of references extends not merely to the official diplomatic documents, but to various other documents "frequently quoted but not contained in the official publications" such as the German Chancellor's speech of August 4, 1914, the "Brussels documents," the telegrams and letters exchanged between the various sovereigns, etc., etc., all of which are quite properly included in Dr. von Mach's volume. The appendix contains photographic reproductions of the various official publications.

Of course, the value of the work from the scholarly point of view must lie in the summaries and foot-notes, and it is here that the reviewer is constrained to believe that prejudice creeps in. Aside from the notes which are merely useful cross-references, the great bulk of the notes are argumentative criticisms of the documents of the Allied Powers and of their contentions. Aside from a very fair general admission in the introduction as to the meagerness of the German docu-

ments, the criticisms of the documents of the Central Powers or of the Teutonic viewpoint are practically nil. It would seem, therefore, that the impartiality of the book can only be defended either on the theory that the merits of the Allied documents speak for themselves or that they have none. The general argumentative and controversial character of the foot-notes can be better understood by quoting one of the despatches, together with Dr. von Mach's foot-notes, than in any other way. The despatch selected is the note of M. Davignon, Belgian Minister for Foreign Affairs, to Herr von Below Saleske, German Minister at Brussels, of August 3, 1914, Belgian Gray Book, No. 22, von Mach, pp. 421-422:

The German Government stated in their note of the 2nd August,¹ 1914, that according to reliable information French forces intended to march on the Meuse via Givet and Namur, and that Belgium, in spite of the best intentions, would not be in a position to repulse, without assistance, an advance of French troops.²

The German Government, therefore, considered themselves compelled to anticipate this attack and to violate Belgian territory. In these circumstances Germany proposed to the Belgian Government to adopt a friendly attitude towards her, and undertook, on the conclusion of peace, to guarantee the integrity of the Kingdom and its possessions to their full extent. The note added that if Belgium put difficulties in the way of the advance of German troops, Germany would be compelled to consider her as an enemy, and to leave the ultimate adjustment of the relations between the two States to the decision of arms.

This note had made a deep and painful impression³ upon the Belgian Government.

The intentions attributed to France by Germany are in contradiction to the formal declarations made to us on August 1, in the name of the French Government.

Moreover, if, contrary to our expectation, Belgian neutrality should be violated by France, Belgium intends to fulfil her international obligations and the Belgian army would offer the most vigorous resistance to the invader.⁴

¹ Belgian Gray Book, No. 20, August 2.

² This is exactly the same argument advanced by Great Britain in the second of the Brussels documents (see p. 580) when the British officer claimed that the British troops would enter Belgium even unasked.

³ The ring of sincerity in this sentence is lessened after having studied the document mentioned in the previous note.

⁴ It would, however, have been almost hopeless, for since Great Britain had the military secrets of Belgium, France had them also, undoubtedly. See documents mentioned in preceding notes.

The treaties of 1839, confirmed ⁵ by the treaties of 1870, vouch for the independence and neutrality of Belgium under the guarantee of the Powers, and notably of the Government of His Majesty the King of Prussia.

Belgium has always been faithful to her international obligations,⁶ she has carried out her duties in a spirit of loyal impartiality, and she has left nothing undone to maintain and enforce respect for her neutrality.

The attack upon her independence⁷ with which the German Government threaten her constitutes a flagrant violation of international law. No strategic interest justifies such a violation of law.

The Belgian Government, if they were to accept the proposals submitted to them, would sacrifice the honour of the nation and betray their duty towards Europe.

Conscious of the part which Belgium has played for more than eighty years in the civilization⁸ of the world, they refuse to believe that the independence of Belgium can only be preserved at the price of the violation of her neutrality.

If this hope is disappointed the Belgian Government are firmly resolved to repel, by all the means in their power, every attack upon their rights.

In like manner, it appears to the reviewer that the daily summaries are colored by the editor's viewpoint and both by what is stated and still more by what is not stated are converted into arguments. The following extract from the summary for August 4th, p. 432, may be taken as illustrative of this point:

"Great Britain sends an ultimatum to Germany concerning the neutrality of Belgium. Since she, however, announces herself to be the ally of France, who is at war with Germany, even the acceptance by Germany of the terms of the ultimatum could not have kept Great Britain neutral. At the same time she urges Belgium to resist the expected invasion with force of arms, this being her reply to Belgium's appeal for diplomatic intervention, which as the ally of France she could, of course, not render."

For further illustration of the argumentative and conversable character of the book the reader is referred to practically any page containing a foot-note or a summary. That these foot-notes and summaries have, however, not impressed everyone as they do the

⁵ It had been claimed in Parliament in 1870 that the treaties of 1870 invalidated those of 1839. See the editor's *Germany's Point of View*, the chapters on Belgium.

⁶ Germany claims that this is not true in view of the Brussels documents.

⁷ Germany had explicitly disclaimed making any attack on the "independence" of Belgium.

⁸ The writer here forgot the chapter of Belgian atrocities in the Congo.

present reviewer may be inferred from the statement of one of Dr. von Mach's distinguished admirers (and presumably readers) who says (in the *Staats-Zeitung*): "I like Dr. von Mach's book because it does not obtrude his opinions upon the reader."

Many of the criticisms of the Allied documents appear to the reviewer to pick flaws which are too microscopic to be worth much attention. See, for instance, the following notes, stressing the use of the word *ally* in the despatches: p. 443, note 2; p. 444, note 4; p. 445, note 2; p. 447, note 6; or the following relating to the precise language used in various despatches in referring to Belgian neutrality: p. 438, note 5; p. 439, note 1; and p. 440, note 2.

In a despatch of M. Paul Cambon, French Ambassador at London, to his Government, dated August 3rd (French Yellow Book, No. 143, von Mach, pp. 425-426), the Ambassador refers to a telephonic communication from Paris, and Dr. von Mach appends the following note: "This is very important, because it suggests that besides the *written* communications which are printed in the official books of documents, other communications were exchanged between London and Paris and undoubtedly other places too." It is quite true, as has been pointed out by others, that the telephone introduces a new and important element into modern diplomatic exchanges, but in view of the microscopic details with which Dr. von Mach's foot-notes deal, one wonders why this "important" point was not at least tied up by a cross reference with an earlier despatch of July 31st from Sir Edward Goschen, British Ambassador at Berlin to Sir Edward Grey (British Blue Book, No. 121, von Mach pp. 386-387), in which Sir Edward Goschen refers to telephonic communications between Berlin and Vienna.

One clear misstatement of an important fact merits special notice. In the summary for Wednesday, August 5th, the author says, p. 459, "Great Britain declares war on Germany as of 11 A.M." etc. This was probably a careless assumption from Belgian Gray Book, No. 41, of August 5th, which recites that Great Britain has informed Germany "that a state of war existed between the two countries as from 11 o'clock"; but of course the 11 o'clock referred to was 11 o'clock at night of August 4th. (See Mr. Asquith's declaration in Parliament August 5, 1914, where he said "since 11 o'clock last night a state of war has existed between Germany and ourselves" (British Blue Book, von Mach's photographic reproduction, p. 98).

As Dr. von Mach points out in the introduction, "a great amount

of additional information" gathered from all sources has been included in the foot-notes. This information, however, is not always of a character which commends itself for insertion in an impartial source book for scholars. For instance, see note 2 on page 73 in which Dr. von Mach states what appears to be his understanding (not in quotation marks) of an affidavit which he states is in his possession, made by parties unnamed, as to what they say a British officer, who is named, said in an address before the Boston Press Club in 1915 about what his superiors told him in June and July, 1914, and how he went to Antwerp in pursuance of these instructions "about one week before the first declaration of war . . . to concert measures with the head of the Belgian secret service;" — all of which Dr. von Mach appears to think worthy of consideration as tending to explain why Belgium commenced to take precautions to preserve her neutrality on July 24, 1914.

In conclusion, the reviewer wishes to say again that, once the partisan character of the book is frankly admitted, it is a useful compilation, but as "a serviceable source book not for partisans but for scholars and intelligent readers" it distinctly fails to register.

WILLIAM C. DENNIS.

The United States Post Office: Its Past Record, Present Conditions, and Potential Relations to the New World Era. By Daniel C. Roper. Illustrated. New York: Funk and Wagnalls Co. 1917.

Mr. Roper was for three years the First Assistant Postmaster General, and his efficient services led to his appointment as Vice Chairman of the New Tariff Commission, and subsequently as Commissioner of Internal Revenue, — perhaps the most onerous and important post in the government service, under existing war conditions, next to that of a Cabinet officer. He has written this volume, as he says in the preface, in the belief that the world war marks the beginning of a new era for our country, and that there opens up for the federal postal service in consequence a greater potentiality for service to the country and mankind than it has ever rendered in the past.

The book is a concise and readable survey of the origin and development of the federal postal system, and of the various steps which mark the history of this development. It describes the internal workings of the post office; the development of the railway mail service: the star

route system; the establishment and marvelous growth of the rural free delivery and the parcels post; the money order service and the postal savings banks; it points out how all these things tend to supersede sectionalism by nationalism, and to promote not only private comfort and convenience, but national solidarity and patriotism.

The feature of the post office service most interesting to the readers of this JOURNAL, and most important of all, is its international growth. It has gradually become an umbilical cord, bringing every country into intimate and direct contact with every other. It seems incredible to this generation that this reform, so natural and inevitable, should have been so long delayed, and so greatly impeded by certain great nations, in order to preserve a petty advantage of the control of postal receipts in the international transportation of the mails. It is a source of pride to Americans that the United States was one of the first to agitate for an international postal agreement, and was more effective and earnest than any other in finally bringing it about. "As recently as 1860," says Mr. Roper, "anyone who wished to mail a letter to a foreign destination was under the necessity of consulting numerous schedules of the postage rates and of indicating on the letter the exact route by which it was to go. Not even his postmaster, very often, could advise him intelligently."

Postmaster General Montgomery Blair, at the beginning of Mr. Lincoln's administration, recognized the necessity for the standardization of international postal rates, and of the weight limits and other conditions of mail service between nations. It was on his initiative, through the Department of State, that the first international conference was held to consider these problems. Twelve European and three American countries participated in this conference, which was held in Paris, in 1863. As a direct outcome, the International Postal Convention at Berne, Switzerland, was held in 1874, and took the initial steps in the greatest postal reform in the history of the world. It framed an agreement to which twenty-three nations adhered, to the effect that postage was to be prepaid in all cases, and was fixed for letters at the uniform rate of five cents per half ounce. Each nation retained the postage collected on its outgoing letters, and the postage stamps and post marks of each nation were recognized by all other nations as entitling mail matter to dispatch, delivery, and forwarding anywhere within the consolidated postal territory of the world. A permanent organization was provided for at Berne, and it was agreed

that conventions should be held from time to time as might be necessary to consider changes and amendments proposed by the member nations.

A second conference met in Paris in 1878, which made many improvements in the system; others have followed at intervals, and every civilised country is now a member, and the nations of the world constitute one postal territory. The Universal Postal Union was the first and in many ways remains the most important instance of the united action of the nations, the first act of world legislation. It remains the practical demonstration of the possibility of that ultimate parliament of the world of which the poet has dreamed, and which practical students and statesmen count upon as the ultimate substitutive for international wars. Not until the greatest of all the wars the world has yet known shall have come to its end, will we be able to know whether its incalculable sufferings and sacrifices have brought us nearer to the goal.

S. N. D. NORTH.

The Hague Court Reports. Publication of the Carnegie Endowment for International Peace, Division of International Law. Edited with an introduction by James Brown Scott, Director. New York: Oxford University Press, American Branch. 1916. pp. cxi, 664. \$3.50.

This is a collection in English of the first fourteen decisions rendered by the tribunals of the Permanent Court of Arbitration at The Hague under the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. There are also included the reports of the first two International Commissions of Inquiry constituted under the same conventions. The need for the collection within a single volume of these important international decisions cannot be better put than in the report of the editor, Dr. Scott, which he made to the Trustees of the Endowment recommending their publication by the Division of International Law:

It is unnecessary and, indeed, out of place in this report to descant upon the importance of the Permanent Court and of the awards rendered by special tribunals, because, however imperfect the machinery and however open to criticism some of their awards may be, the fact is that the organisation of the first tribunal chosen from the panel marks an era in international relations and the first step taken for the creation and development of arbitral jurisprudence.

The Administrative Council publishes brief abstracts of the proceedings before the special tribunals and prints the official awards. These documents are in French

and, so far as the Director has been able to learn, the awards have not been collected and published in a separate volume, which could be consulted by any and all who happen to be interested in this method of settling international disputes.¹ The American Journal of International Law has translated and published each decision as it appeared, but the awards, which are interesting and valuable, are scattered through a number of volumes and are thus not easily found or consulted. The Endowment has received numerous requests both for the awards and for information concerning them. The Secretary has been unable to comply with these requests and he has been unable to refer inquirers to any single volume, in French or English, in which the texts of the awards are to be found, with the exception of a Dutch publication entitled *Grotius, International Year Book*, in which the awards are printed in the language in which delivered. (Year Book of the Endowment, 1913-1914, pp. 139-140).

Each award and finding is preceded by a syllabus giving the essential facts and holdings of the tribunal or commission or inquiry. It is followed by the agreement of submission and antecedent documents useful in forming a complete understanding of the scope and juridical value of the award. Where maps and charts accompanied the decisions, these have been reproduced and inserted in their proper places. The Editor states in his preface that the translations of the awards and other documents have been obtained from the most reliable sources available. Official translations have been reproduced in official form; unofficial translations have been edited to such a degree as seemed necessary; where neither kind of translation was obtainable, the translations were made by the Endowment. He adds: "In view of the fact that the accuracy of the translations might be questioned, especially with respect to the more important documents, an Appendix has been added which contains the original official texts of the translated documents." As an annex to the Editor's introduction, he prints the original texts and translations of the Hague Convention of 1899 and 1907 for the pacific settlement of international disputes.

GEORGE A. FINCH.

¹ Since Dr. Scott's report was written, these decisions have been published in volume form by Professor George Grafton Wilson, of Harvard University, under the title *The Hague Arbitration Cases* (Boston: Ginn & Co. 1915. pp. x, 525). Professor Wilson's collection contains, in addition to the awards, the compromise, protocols, or agreements for submission. The official language is given in each case, and where that is not English, a translation is given on the opposite page. — G. A. F.

Grotius — Annuaire International Pour 1915. The Hague:
Martinus Nijhoff. pp. 200

This little volume opens with a review, interesting from a banking standpoint, of "The Netherlands Bank and the War," followed by an *Aperçu de Faits Internationaux Juridiques*. The latter covers the period from February 15, 1914 to September 1, 1915, condensed within the limits of twenty-three pages and, therefore, of necessity not comprehensive in any satisfactory meaning of the term. There follow comments upon Netherlands' jurisprudence, a list of the members of the Permanent Court of Arbitration, and, seeming like an echo from a forgotten past, the fourteenth sentence of the Permanent Court of Arbitration in the matter of the dispute between Holland and Portugal. In addition there is contained a summary of treaties between The Netherlands and foreign countries touching questions of arbitration and other information relative to permanent international treaties, having a certain referential value. The book concludes with a bibliography for the years 1914-1915 upon the subject of public international law.

The work described has, as may be inferred, greater value in Holland than elsewhere.

Diplomatic Documents relating to the Outbreak of the European War.

Publication of the Carnegie Endowment for International Peace, Division of International Law. Edited with an introduction by James Brown Scott, Director. New York: Oxford University Press, American Branch. 1916. 2 vols., pp. lxxxi, xcii, 1516. \$7.50.

A reprint in two volumes of the official English translations of the two "Red Books" issued by Austria-Hungary, the two "Gray Books" issued by Belgium, the French "Yellow Book," the German "White Book," the Italian "Green Book," the two Russian "Orange Books," the Serbian "Blue Book," and the official text of the two British "Blue Books." Each volume is preceded by a table of contents which lists and summarizes every paper and document printed therein, and at the end of the second volume there is an analytical index digest, which, in addition to ordinary index purposes, will be found most useful in tracing the attitudes of the several countries upon important points in

the negotiations which ended in the outbreak of war. Another useful feature of the work is a list of all important personages who are mentioned in or who took part in the correspondence, showing their official positions at the time.

The Hague Conventions and Declarations of 1899 and 1907. Publication of the Carnegie Endowment for International Peace, Division of International Law. Edited by James Brown Scott, Director. New York: Oxford University Press, American Branch. 1915. pp. xxx, 303. \$2.00.

This volume contains the official English translations of the conventions signed at and the declarations adopted by the two Hague Conferences, printed in parallel columns where each Conference adopted a convention on the same subject. They are accompanied by tables of signatures, ratifications and adhesions of the various Powers, the accuracy of which is vouched for by the Department of State of the United States, and the official depository of the acts of ratification and adhesion — The Ministry for Foreign Affairs of the Netherlands. The book also contains English translations of the complete texts of the reservations to the various conventions made during the course of the Conferences by the different Powers. A copious index-digest, covering 37 pages, adds materially to the usefulness of the volume.

This useful volume has also been published in Spanish.

The Freedom of the Seas. By Hugo Grotius. Publication of the Carnegie Endowment for International Peace, Division of International Law. New York: Oxford University Press, American Branch. 1916. pp. xv, 83. \$2.00.

An English translation of the *Mare Liberum* of the "father of international law," accompanied on parallel pages by a revision of the Latin text of 1633. Translation and revision by Dr. Ralph Van Deman Magoffin, Associate Professor of Greek and Roman History in The Johns Hopkins University. Edited with an introductory note by James Brown Scott, Director.

An Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms. By William Ladd. Publication of the Carnegie Endowment for International Peace, Division of

International Law. New York: Oxford University Press, American Branch. 1916. pp. 1+162. \$2.00.

This is a reprint of the original edition of 1840, prefixed by an introduction by James Brown Scott, Director, in which the purpose of Ladd in publishing the work is set forth. A very complete statement of the earlier origin and history of the movement looking to a congress of nations forms a large part of the work and is most instructive.

Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports. Publication of the Carnegie Endowment for International Peace, Division of International Law. Edited with an introduction by James Brown Scott, Director. New York: Oxford University Press, American Branch. 1916. pp. v, 138. \$1.50.

The Editor's announcement gives in concise form the purpose of this publication:

This book was prepared to meet a frequent request for information respecting these instructions and reports which are not to be found elsewhere in convenient form. Prefixed to the instructions and reports relative to each of the two conferences are documents of a preliminary character showing the origin of each conference and the successive steps taken in advance of the holding of the conferences. The reports of the two delegations will be found most interesting and instructive in that they represent the views of the American delegates on the particular subjects referred to and which were the subject of action by the conferences.

The Status of the International Court of Justice and An International Court of Justice. By James Brown Scott. Publications of the Carnegie Endowment for International Peace, Division of International Law. New York: Oxford University Press, American Branch. 1916. pp. v, 93 and 108. \$1.50 each.

The first is an exposition of the present status of the International Court, giving the reasons for or objects of its proposal, with the previous history of the movement in favor of arbitration. It also discusses the project of the American delegates submitted to the Second Hague Conference and the reasons for the nonestablishment of the Court by that Conference. An appendix contains addresses by the different delegates at the Conference on the subject of the proposed Court, and other pertinent documents, including a draft convention for its establishment.

What might be called a companion volume has also been issued by the Division of International Law under the title *An International Court of Justice*. It is a reprint of a letter and memorandum prepared and submitted by Dr. Scott on January 12, 1914, to the Netherland Minister for Foreign Affairs, which, recognizing the great difficulties in the way of establishing a court for all the nations of the world, propose the constitution of the court by a limited number of Powers as a first step toward a world court.

BOOKS RECEIVED

(Mention here does not preclude an extended notice in a later issue of the JOURNAL.)

Addresses on International Subjects. By Elihu Root. Collected and edited by Robert Bacon and James Brown Scott. (Cambridge: Harvard University Press. 1916. pp. ix, 463. \$2.50.)

Latin-America and the United States. Addresses by Elihu Root. Collected and edited by Robert Bacon and James Brown Scott. (Cambridge: Harvard University Press. 1917. pp. xvi, 302. \$2.50.)

Military and Colonial Policy of the United States. Addresses and Reports by Elihu Root. Collected and edited by Robert Bacon and James Brown Scott. (Cambridge: Harvard University Press. 1916. pp. xxiv, 502. \$2.50.)

Addresses on Government and Citizenship. By Elihu Root. Collected and edited by Robert Bacon and James Brown Scott. (Cambridge: Harvard University Press. 1916. pp. ix, 552. \$2.50.)

Jewish Disabilities in the Balkan States. American contributions toward their removal, with particular reference to the Congress of Berlin. By Max J. Kohler and Simon Wolf. A paper presented at the twenty-fourth annual meeting of the American Jewish Historical Society. (Publication No. 24 of the American Jewish Historical Society. 1916. pp. xi, 169.)

Leading Cases on International Law. By Lawrence B. Evans, of the Massachusetts Bar. (Chicago: Callahan & Co. 1917. Cloth, pp. xix, 477. \$3.50.)

A Guide to Diplomatic Practice. By the Rt. Hon. Sir Ernest Satow. (London and New York: Longmans, Green & Co. 1917. Cloth, 2 vols., pp. xxii, 407, ix, 405. \$9.00.)

International Conventions and Third States. A monograph by Ronald F. Roxburgh, of the Middle Temple. (London and New York: Longmans, Green & Co. 1917. Cloth, pp. xvi, 119. \$2.50.)

America's Case against Germany. By Lindsay Rogers, Adjunct Professor of Political Science in the University of Virginia. (New York: E. P. Dutton & Co. Cloth, pp. xv, 284. \$1.50.)

The Immediate Causes of the Great War. By Oliver Perry Chitwood, Professor of European History in West Virginia University. (New York: Thomas Y. Crowell Co. Cloth, pp. xii, 196. \$1.35.)

Die Gestaltung des Völkerrechts nach dem Weltkriege. By Otfried Nippold. (Zurich: Orell Fussli. 1917. Paper, pp. vi, 285. 10 fr.)

The Political Writings of Jean Jacques Rousseau. Edited from the original manuscripts and authentic editions, with introductions and notes, by C. E. Vaughan, Emeritus Professor of English Literature in the University of Leeds. (Cambridge: University Press. New York: G. P. Putnam's Sons. 1915. Cloth, 2 vols., xix, 516, 577. \$18.50.)

The American Peace Treaties. Full texts of treaties, with an introduction and a commentary, by Chr. L. Lange, Secretary General. (Interparliamentary Union: Christiania. 1915. Paper, pp. 80.)

Problems of the War. Papers read before the Grotius Society in the year 1916. Vol. II. (London: Sweet and Maxwell, Ltd. 1917. pp. xxv, 178. 6s.)

La Garantie de la Société des Nations. By Gaston Moch. (Paris: Marcel Rivière & Cie. 1916. Paper, pp. 44. 40 centimes.)

Les Affinités françaises de l'Alsace avant Louis XIV et l'iniquité de sa séparation de la France. By Jacques Flach, member of the Institute and professor at the College of France. (Paris: Recueil Sirey. 1915. Paper, pp. 158. 2 fr. 50.)

Du droit de la force à la force du droit. By Edgard Milhaud, Professor at the University of Geneva. (Geneva: Edition Atar. 1915. Paper, pp. 128. 1 fr.)

The Stakes of Diplomacy. Popular ed. By Walter Lippmann. (New York: Henry Holt & Co. 2d ed. Paper, pp. xxii, 235. 60c.)

Fluctuation of the Populations during the World War. I. Germany and France. Bulletin No. 3 of the Society for the Study of the Social Consequences of the War. (Copenhagen: Selskabet for Social Forsken af Krigens Folger. 1917. Paper, pp. 141.)

Defensively armed Merchant Ships and Submarine Warfare. By A. Pearce Higgins. (London: Stevens & Sons, Ltd. 1917. Paper, pp. 56. 1s.)

The Mexican Constitution of 1917 compared with the constitution of 1857. Translated and arranged by H. N. Branch, with a foreword by Dr. L. S. Rowe. (Philadelphia: The American Academy of Political and Social Science. 1917. Paper, pp. v, 116.)

Russian Foreign Policy in the East. By Milvoy S. Stanoyevich. Oakland and San Francisco: Liberty Publishing Company. 1916. (Paper, pp. viii, 38.)

The Monroe Doctrine, an Interpretation. By Dr. Albert Bushnell Hart. (Boston: Little, Brown & Co. 1916. Pp. xiv, 445.)

Breaches of Anglo-American Treaties. By Major John Bigelow, U.S.A., retired. (New York: Sturgis & Walton, 1917. Pp. ix, 248. \$1.50 net.)

Germany's Commercial Grip on the World. By Henri Hauser. Translated by Manfred Emanuel. (New York: Charles Scribner's Sons. 1917. Pp. 259.)

Die Völkerrechtliche Stellung des Papstes und die Friedenskonferenzen. By Dr. Josef Müller. (New York: Benziger Bros. 1916. Pp. xvi, 234.)

Los Extranjeros en Venezuela. By Dr. Simon Planas Suarez. 2d ed. (Lisbon: Centro Tipografico Colonial. 1917. Pp. 368.)

America and the Canal Tille. By Joseph C. Freehoff. (Published by the author. 1916. Pp. 404. \$1.50 net. The same in Spanish, published by the Ministry of Foreign Affairs of Colombia. Pp. 342.)

The Deportation of Women and Girls from Lille. Translation of note addressed by French Government to neutral Powers, with extracts from documents. (New York: G. H. Doran Co. Pp. 81.)

Teoria Critica de las Bases del Derecho. Internacional Privado. Tomo primero. (Caracas. 1917. Pp. x, 446.)

Organisation Centrale pour une Paix durable. Recueil des Rapports sur les différents points du Programme-Minimum. 3d pt. Pp. 383; Commentaire officiel du Programme-Minimum. Pp. xv, 48. (The Hague: Martinus Nijhoff. 1917.)

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For list of abbreviations, see p. 857.]

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- Aërial Warfare.* Air raids and the new war. Harold F. Wyatt. *Nineteenth Century*, 82:31. July.
- Albania.* Albania, Austria, Italy. O. de L. Essaid. *Contemporary*, 92:145. Aug., 1917.
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- . New Republic of Koritza. Reorganization in Albania. *Current History*, 6:Pt. 2:87. July.
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- . Armenian (The) tragedy. Edmund Candler. *Current History*, 6:Pt. 2:332. Aug.
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KATHRYN SELLERS.

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[*Abbreviations: BN.*, book note; *BR.*, book review; *Ed.*, editorial comment; *JD.*, judicial decision; *LA.*, leading article; *rev.*, reviewer; *Tr.*, translator.]

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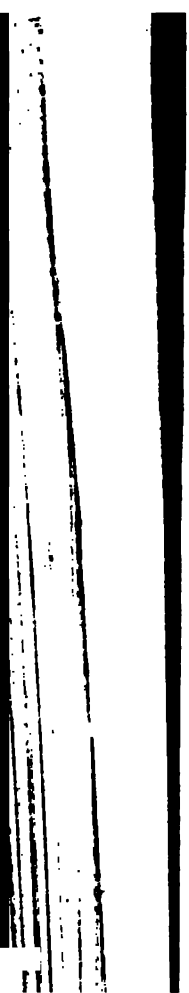
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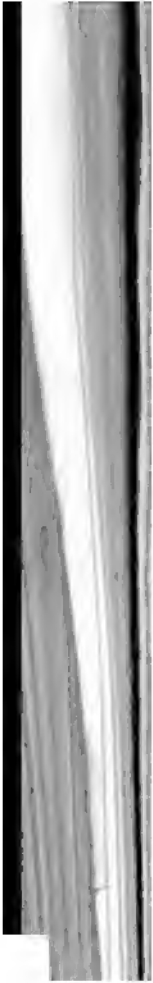
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